

THE  
LAWS and CUSTOMS  
*80. of Anglo*  
SCOTLAND,  
IN MATTERS  
CRIMINAL.

Wherein is to be seen how the Civil  
LAW, and the LAWS and CUSTOMS of other Nations doth  
agree with, and supply Ours.

By Sir **GEORGE MACKENZIE**  
of *Rosehaugh.*

To this Second Edition is now added (by way of APPENDIX) A  
*Treatise of Mutilation and Disembellishment and their Punishment,* by  
Sir **ALEXANDER SETON** of **PITMEDDEN** Knight  
Baronet.

Also a Second Edition of the Observations upon the 18 *Art.* Parl. 23.  
**K. JAMES** Sixth. *Against Dispositions made in defraud of Creditors,*  
&c. Corrected, and in several Paragraphs much Enlarged by the Au-  
thor, the same Sir *George Mackenzie* himself, before his Death.



**EDINBURGH**

Printed by the Heirs and Successors of *Andrew Anderson*, Printer to  
the King's most Excellent Majesty. For Mr. *Andrew Syme*,  
and are to be Sold by him, in the *Congate*, near the Foot of  
the *Horfe-wynd*. Anno DOM. 1699.



# AT EDINBURGH,

November 11. 1697.

**T**HE Lords of His Majesties Privy Council being informed, that Mr. Andrew Symson, Merchant Burgess of Edinburgh, has caused Print the Books following, viz. A new Edition of the Laws and Customs of SCOTLAND, in matters Criminal, by Sir GEORGE MACKENZIE of Rosehaugh; To which is now added by way of Appendix; a Treatise of the Crimes of Mutilation and Dismembration; and of Retaliation by which it is punished; wherein several Questions concerning that Subject are discussed. Item a new Edition of the Observations upon the Act Eighteenth, Parliament twenty Third, K. JAMES the sixth, against Dispositions made in defraud of Creditors, &c. By the said Sir George Mackenzie of Rosehaugh, Corrected, and in many Paragraphs much enlarged by the said Sir George himself. The saids Lords do hereby grant sole Power, Liberty and Warrant, to the said Mr. Andrew Symson, or such Persons as he shall appoint, to Print, Vend, and Sell the saids two Books; And discharge all other Persons whatsoever to Re-print, Vend, Sell or Import any of the saids Books for the space of Nineteen Years, after the Day and Date hereof, under the Penalty of five hundred Merks, to be payed to the said Mr. Andrew Symson, or his Assignees; by and attour the Confiscation of the saids Books to the said Mr. Andrew, for his use and behoove. Extracted by me

GILB. ELIOT. Cls. Sti. Concilii.

## ERRATA.

**T**hough a great deal of care was used to revise the Sheets, yet the following Errata must be corrected; Literal faults, and some Errors in the Punctuation, and others of little moment, are not marked, which is supposed the Reader will easily perceive.

Page 1. l. 29. for *delicta* into, r. into *Delicta*, l. 31. point in thus Criminally, such as small Ryots. *Delicta*, p. 13. l. 35. f. should be r. should not be p. 14. l. 15. f. Common r. Canon l. 33. f. fall r. fault p. 27. l. 14. f. Theft, r. Theft. l. 15 f. Murder, r. Murder. P. 31. l. 14 f. had r. have l. 16. f. perl. r. per. l. P. 45. f. II, III IV. V. r. 2. 3. 4. 5. P. 45. l. 31. f. most r. more P. 51. l. 47. r. fumes of Wine P. 55. l. 15. f. *indubita; tam* r. *indubitatam*; P. 55. l. 53 & 54. point thus: *Mathematicum, nemo Aristum. Augurum & datum prava confessio conticeat. Silent* &c. P. 95. l. 15. f. who r. which & f. inventions r. invasions l. 30. r. resisted. P. 70. l. 41. r. of Cognitions, P. 87. l. 13. & P. 132. l. 33. & P. 133. l. 26. & P. 219. l. 28. & 42. & P. 225. l. 21. f. descendant r. *Defendant*. P. 93. l. 13. f. *damno* r. *damno*. P. 96. l. pen: r. *con-*  
*stellatio*. l. ult. r. *gratia, vel ipsius rei, delectam usus ejus, possessionisve, quod legi naturali, &c.* P. 109. l. 28. f. of r. or. P. 121. l. 41. the words who are not (as the Justices) tyed to strict Law. *must be removed to the end of the next Paragraph*, P. 132. l. 5. r. his own Cause. P. 162. l. 17. & P. 164. l. 5. r. Dispo-  
sition. P. 169. l. 47. f. many r. in any. P. 171. l. 2. r. *arbitraria*. l. 14. r. I approve. l. 24. r. extinguish. P. 199. l. 9. f. present r. pursue. P. 208. l. 15. f. at r. for. P. 211. l. 15 f. of r. by. P. 212: l. 21. f. *angustalis* r. *augustalis*. P. 216. l. 11. r. quarter secured against. P. 239. l. 6. f. *prohibatur* r. *prohibebatur*. P. 258. l. 27. f. proved? r. prove it? P. 262. l. 22. f. others r. theirs P. 267. l. 5. r. cannot be received P. 291. l. 4: & 6: f. Conclusion r. Collusion.

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TO HIS GRACE  
JOHN Duke of LAUDERDALE,  
*Marquess of March, Earl of Lauder-  
dale, and Guildford, Viscount Mait-  
land, Lord Thirlestane, Musleburgh,  
Boltoun, and Petersham: President  
of His MAJESTIES most Honourable  
Privy Council of SCOTLAND, Sole  
Secretary of State for the said Kingdom;  
Gentleman of His MAJESTIES  
Bed-Chamber: and Knight of the most  
Noble Order of the Garter.*

25 F29 E. K. S. per H. W. H.

*May it Please Your Grace,*



THOUGH the Number, and Wit of such as use to write Dedications, may seem to have exhausted all that can be said upon such Occasions: Yet I have a new way of Address left me, which is, to write nothing of you, but what is true, by the Confession of your Enemies, who admire more the Greatness of your Parts, than of either your Interest, or Success: And how you have made so great a Turn in this Kingdom, without either Blood or Forfeiture, shewing neither Revenge, as to what is past, nor Fear as to what is to come; Continuing no longer your Unkindness to any Man, than you think he continues his Opposition to his Prince.

All have at some time confest, that you have been the Ornament, as well as Defence of your Native Countrey, to whom every *Scottish-man* is almost as dear, as every Man is to his own Relations. And I am sure that your Enemies will find it easier to put you from your Office, than to fill it; and none of them can wish you to be removed, without being himself a Loser by it. Nor can I be so unjust, even to such as opposed you, as not to acknowledge that I have heard them talk of you so advantageously (when Design and Interest obliged them to dissemble) as almost convinced me, that the most of them

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## *The Epistle Dedicatory.*

them opposed you only in publick, rather from the glory of having so great an Adversary, than from the Justice of the Undertaking. And your Countrey has in their late Confluences, ( where they crouded in mighty Numbers, and with a remarkable Joy to meet you, when a privat Man ) shew'd greater Respect to your naked Merit, than to the highest Characters by which others were marked out for publick Honour.

Having writ this Book to inform my Countrey-men, and to Illuminat our Law, I could not present it more justly to any, than to your Grace, who has derived your Blood from a Noble Family, which has been still Eminent in our Courts of Justice, since we had any; And who are your self the greatest States-man in *Europe*, who is a Scholar; and the greatest Scholar, who is a States-man: For to hear you talk of Books, one would think you had bestowed no time in studying Men; And yet to observe your wise Conduct in Affairs, one might be induced to believe, that you had no time to study Books. You are the chief Man who does nobly raise the Study of the Civil Law, to a happy usefulness, in the greater and general Affairs of *Europe*, and who spends the one half of the day in studying what is just, and the other half in practising what is so: All which may be easily believed, from me who am as great an instance of your Generosity, as an Admirer of it. Especially since you have left me nothing to wish, so that what I say, needs not flow from Flattery, and so must be presumed to flow from Conviction and Gratitude in,

*Your Graces most Faith-  
full, and Humble  
Servant,*

**George Mackenzie.**

**T H E**



THE  
AUTHORS  
DESIGN:



HE great Concerns of Men, are their Lives, Fortunes, and Reputation, and these three suffering at once in Crimes, it is the great Interest of Mankind, to know how to evite such Accusations, and how to defend themselves, when accused: And yet none of our Lawyers have been so kind to their Countrey, as to write one Sheet upon this pleasant and advantageous Subject, which made it o Task both necessary and difficult to me.

In prosecuting this Design, I was forced to revise and abbreviat those many and great Volumes which make up our Criminal Registers, and having added to them these Observations I have myself made, during my twenty years attendance upon that Court, either as Judge, or Advocat; I collationed all with our Statutory Law, the Civil Law, and the Customs of other Countries, and the Opinions of the Doctors: And, as I may without vanity say, that few valuable Authors treat of Crimes, whom I have not read; So there is nothing here which is not warranted by Law, or Decisions, or in which, when I doubted, I did not confer seriously with the learned'st Lawyers of this Age; And yet I doubt not but in some things, others may differ from me, as the best Writers do amongst themselves: And having only designed to establish solidly the Principles of the Criminal Law, I wanted room for treating learnedly each particular case, or even for hinting at all such cases as may be necessary; And without wearying my Readers with Citations, (which was very easie) I have furnished the Book with as much Reason as is ordinary to be found in legal Treatises.

The Reason why I have so oft cited the Basilicks, Theophil, and the Greek Scholiasts, was not only because none before me have used them in Criminal Treatises, but because I conclude them the best Interpreters of Justinians Text: For these Books having been write in the same Age, and Place, and some of them by those who compiled the Latine Text, they must understand it best of all others, of which I have given many Instances in this Book, and shall here add one, there forgot, which is, that the Latine Interpreters doubt much what is meant by Remittendum in the Constitution, Si quis Imperatori maledixerit, some interpreting it pardoned, some to be sent back to the Emperor: But the Basilicks render it *οὐκ ἐπιτιμῶν*, which signifies only Ignoscendum.

I cannot but admire much the wisdom of God, who gives not only Inclination, but Pleasure to such as toyl for the good of others; For I am sure few men would have from any weaker Impulse bestowed so much time, and so many thoughts upon an Employment, which without bringing Gain, will certainly bring Envy and Censure: For I find it is the Genius of this Age to admire such as make the

## The Design.

Publick Good bend to their Designs, and to hate such as design to inform them, as if he were more my Friend who would set my Family by the Ears, than he who instructed my Children and Servants in necessary Duties.

There are but too many who endeavour now to make all whom they hate, pass for such as love Arbitrary Government; But as in many Passages of my former Life, I have preferred my Countreys Interest to my own, so in this Book I endeavour to oppose Arbitrariness, where it is most dreadful, and that is, in matters Criminal, in which Life and Fortune are equally exposed: For he who disinterestedly declares his own Opinion, before privat cases occur, (wherein Interest or Inclination may byass him) doth in so much preclude himself, and others too (as far as his Authority can reach) from the power of being Arbitrary; and let others say what they please, I will stand more in awe of my Conscience than of my Enemies, and govern my self more by my own Reason, than by the giddy Multitude. I hope I need not be jealous that our publick Differences will make any unkind to this Book, which is published for their Service, and which is now more accurate, than when it at first pleased them in Sheets. I did Print it not only to correct the many false Coppies which were abroad, but to divert me from refining too much upon our publick Debates; and I wish the reading it may have the same effect upon others. And that all of us would turn things to their true Light, and consider without Passion how happy we are, who live under a Prince of our own Religion and Blood, whose Clemency is as extraordinary as his Restitution, who governs us by our own Laws, and Countrey-men; and distributes all his own Revenue amongst us: That we enjoy by his Prudence a profound Peace, whilst others bleed or starve in lasting Wars. That all the Commerce of Europe is gathered in amongst us; That we are free from those sucking Taxes under which they groan; And are but lately rescued from a Rebellion, in which, after we had emptied our Veins and Purses for Religion and Liberty, we became Atheists and Slaves.

Part

( )

To the much Honoured  
**Mr. ROBERT BENNET**  
**D E A N:**

*And the other worthy Gentlemen of the  
Honourable Faculty of Advocats.*

*Right Honourable,*

**T**He *Laws and Customs of Scotland in Matters Criminal*, written by Sir George Mackenzie of Roschaugh; As also his *Observations on Act 28. Parl. 23. K. Ja. 6. made against Dispositions in defraud of Creditors, &c.* being both out of Print, and frequently called for; I thought fit, being advised thereto, to publish a second Impression of each of them; which is now done in a fairer Character and larger Volume than formerly; and so, if need be, they may be bound up with some of his other Works in Folio.

To the first of these, there is now added by way of Appendix, a *Treatise of Mutilation and Demebration with their Punishments*; wherein several *Questions* relating thereto are discussed; which the Learned Author, as an Addition to his many favours, and reiterated Acts of Kindness, hath allowed me to publish.

As for the Author you have occasion to know Him much better than I, while He continued in the Station of One of the Senators of the Colledge of Justice, and of one of the Lords Commissioners of the Justiciary, wherein He served for diverse years, and was removed from both in that busie Year 1686, wherein the Case of Repealing the Penal Statutes was so keenly agitated in Parliament, of which Penal Statutes He, (as a Member of that Parliament) was a stout and exemplary Defender, fearing that the Repealing of these Laws might tend to the Weakning of the Protestant Religion.

I need not commend the Authors Learning, or other Parts to You, nor would his Modesty allow me to say any thing to that purpose; But I crave leave to say, that I being his Amanuensis, and writing these Papers as dictated from his own Mouth, have often admired his Memory and Readiness, in that He dictated the same into loose Papers, which being transcribed, were immediately sent to the Press, when he was necessitated to attend a vexatious Law-suit of great Moment, and had his, almost hourly, Interruptions from other urgent Affairs; which may be sufficient to excuse the Mistakes of the Book, if any be.

I can further declare, that the industrious and diligent Author was most careful as to his Quotations; for he would not take them upon trust; so that the examining the particular Texts of Law, and the turning over such a vast Number of bulkish Volumes of all sorts which he had Occasion to make use of, and wherewith his Large Library is plentifully stor'd, took up a great deal of time, and was a Work both Tedious and Troublesome.

As to the Observations upon the Act of Parliament made against Bankrupts; He that shall compare this Edition with the former, will find a vast difference between them: This being Corrected and in many Paragraphs much Enlarged by its Author, Sir George Mackenzie himself, before his Death.



( )  
He was a Gentleman well known to you all ; as being one who by his In-  
defatigable *Studies* added to his *Natural Parts*, attain'd to a very great Perfe-  
ction in his *Profession* ; and was Fam'd for his *Learning*, not only at *Home*, but  
*Abroad* ; and particularly the *Doctors* and *Maisters* of the *University* of *Oxford*  
had a great *Veneration* for him, as will appear by their *Records* : As also the  
*Author* of the *Athenæ & Fasti Oxonienses* makes *Honourable Mention* of *Him*,  
concluding that large *Folio* with an *account* of his *Life* and *Death*.

While he was your *DEAN*, he us'd his utmost *Endeavour* that *Law* and the  
*Professors* thereof might arrive to that *Esteem* which both justly deserve ; And  
knowing very well that its impossible for the most ingenuous Artificer to  
make any curious Piece of *Work*, unless he have *Materials* to work on, and  
*Tools* to work with ; and knowing also that *Books* are necessary for *Scholars*  
upon both these *Accounts*, without which its hardly possible, for the *Profes-*  
*sors* of the *Liberal Sciences* to attain to any tolerable *Degree of Perfection* ;  
therefore he was very instrumental towards the erecting of that noble *Li-*  
*brary*, of *Law-books* especially, which you now possess.

I find by your printed *Catalogue* some years since, that there were many curious  
and rare *Books* then in it, but it is now much enlarged, both by your own *Di-*  
*ligence*, and by the never enough to be commended *Generosity* of Noble *Bene-*  
*factors*. As for my part, if among the vast Multitude of old *Books*, that al-  
most daily pass through my Hands, there shall be found any curious *Pieces*  
( and sometimes a *Pearl* may be found in a *Dunghill* ) which you want ; I  
shall be very willing to have them transplanted from my obscure *Nursery* to  
your more publick and pleasant *Garden* ; and for that end I shall have distinct  
*Alphabetical Catalogues*, of such as come to my hands, lying patent, that so any  
of your *Number* may, at any time, peruse the same.

I have presumed to present this *Impression* to you, to be laid up in your *Bi-*  
*bliothek*, that so it may tend to the further perpetuating of the *Authors* *Me-*  
*mory* : As also that hereby I may take occasion to express my *Gratitude* for  
these many Favours that upon several accounts I have received from such of  
your *Profession*, as I have had the opportunity to be acquainted with.

May your *SOCIETY* thrive & prosper ; may your *Library* so increase, that  
*You* and your *Successors* may be readily supplied with such *Helps*, as upon all  
*Emergents*, *You* and *They* may be in a *Capacity* to defend the *Cause* of the *Oppres-*  
*sed*, and to see the *Sons of Violence* condignly punished ; that so *Mercy* and  
*Truth* may meet together, *Righteousness* and *Peace* may kiss and embrace each  
other ; and then our *Churches* may be *Mountains of Holiness*, and our *Kingdom*  
an *Habitation of Justice* : which has been, is, and shall be the fervent Prayer  
of,

Right Honourable,

Your most humble Servant in all Duty,

ANDREW SYMSON.

TO

ADVERTISEMENT.

the Publisher of this Impression, not in the least doubting but the first Impression contained <sup>several errors</sup>, he followed the same exactly, but upon the perusal thereof it was found, that the first Impression, through the negligence, either of the Ammanensis, or the Corrector of the Press, or perhaps both the learned Author being at the same time taken up with several of publick employments, &c. so had not time enough to revise the same contained many Errors, & omissions, after this second Impression was thought off, a learned and industrious Lawyer, Jacob Axtell Esq. was pleas'd to review the same; and in writing the Amendments on the Margins, and sometimes to add some little Observations or Annotations of his own, which the Publisher having perus'd, he was inclin'd to print the same, that so they might be bound to read this second Impression, and thereby that excellent and useful Book, might be more useful and complete. He also reviewed the Treatise of Bankrupts.

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# PART I.

## TITLE I.

### Of Crimes in general, And by what Law they are judged in Scotland.

- 1 How Crimes differ from Delicts and Malefices.
- 2 In what consists the nature and essence of a Crime.
- 3 By what Laws Crimes are punish'd in Scotland.
- 4 How far dole or design is necessary to the committing Crimes, and how Tendencies and Insinuations are punisht.
- 5 Whether Minors can commit Crimes.
- 6 Whether such as Sleep can commit Crimes.
- 7 Whether such as are Drunk are punishable for Crimes.
- 8 Whether Furious persons are punishable.
- 9 Whether an University or Collective Body be punishable.



OD Almighty having Created this Lower World to be equally an instance of his Power, and of his Goodness, did Furnish it with great variety of excellent, and wonderful Productions: but lest these should be defac'd at pleasure by Man, who having ruin'd himself, doth little value, and is much inclined to ruine every thing besides; therefore God did not only imprint upon his Soul some notas vocat, common Principles, whereby he is led to love Order, but did likewise fence the œconomy and government he had placed in the World with rewards and punishments, And it was just, that as these who did Vertuously, were to be rewarded, so these who were Vicious should be punisht, which Punishments are the subject-matter of the Criminal Law, and of this Treatise.

1. Transgression, or *Peccatum*, is by *Modestinus l. obligamur, ff. de obl. & Act.* made the root of all Enormities, and is divided *delicta* into *quasi-delicta*, & *crimina*. *Quasi delicta*, are such faults and transgressions as are not so hainous that they deserve to be punished Criminally; such as small Ryots, *delicta*, are such as deserve a more severe Punishment, but yet because they tend not to wrong the Common-wealth, and publick security immediatly, therefore do not deserve to be punisht by any exprefs Law as Crimes. Crimes are these Injuries done to the Common-wealth which are so immediat and hainous, as that they are punished by exprefs Law. This distinction is used by *Mathews*: but *Farinacius* makes *delictum* the *genus*, and divides it, in *crimen*, & *maleficium*, with us this subtilty is not observed, for the word Crime, comprehends



prehends both Crimes, and Delicts. The Summons raised for accusing in both, are called Criminal Letters, and the Court in which both are judged, the Criminal Court. Neither use we the word *malefice* in any Crime, but in Witch-Craft, in which it signifies that prejudice, and damage, which arises from the unlawful means used by Sorcerers.

II. In what consists the nature of a Crime may be doubted, and *L. 1. Reg. Maj. c. 1.* A civil Action is defined to be that which concerns Lands or Goods; And a Criminal Action that which concerns Life or Limb. But *Skeen* in his Observations upon that place, do's confess all that to be a Crime which concerns the Publick Good, whether a Corporal Punishment, or Pecuniary Mulct be craved: but this is also too general, especially since the Law divides Crimes in publick and privat Crimes: And therefore I offer these Considerations, 1. All Transgressions of Law are not Criminal, *v. g.* to make a Disposition in defraud of Creditors, is not Criminal, though it be prohibited. 2. That is not only to be accounted a Crime which bears expressly to be punishable by Corporal Punishment, or Pecuniary Mulcts: for in my Lord *Renton's Case* against *Hæm*, it was found, that poynding of Oxen in time of Labouring was Criminal, though it be not appointed by the Act whereby it is prohibited, to be punished by a definit Punishment. Nor is it exprest to be a Crime, likeas, single Adultery, is punishable, albeit it be not declared to be a Crime by any exprest Law with us. 3. That cannot only be thought a Crime, which is committed against the Law of Nature, for Poynding of Oxen is no more such, than making fraudulent Dispositions.

III. The true nature then of a Crime may be comprehended, under these general Conclusions: First, That is a Crime, which is declared such by an exprest Statute, as Murder, Treason; and it were to be wisht, that nothing were a Crime which is not declared to be so, by a Statute; for this would make Subjects inexcusable, and prevent the arbitrariness of Judges. And I find by the general consent of Criminalists, nothing is to be accounted a Crime or punished Criminally; but what is forbid by the Law, under an exprest pain or punishment; for they observe, that as there can be no punishment inflicted, but where a *delict* is committed: so there can be no *delict* but where the Law hath appointed a Punishment, *Cabal Cas. 1.* And this is clear, 1. at *si quis §. divus ff. de Religios. & sumpt. fun. l. hæres ff. de usufr. leg. Sura. consil. 301.* And yet Lawyers assert, that such as disobey, and transgress any prohibiting Law, may be punished arbitrarily, as contemners of the Law, *sutably to the degree of their contempt*, though they cannot be punished Criminally as guilty of a Crime, *Cabal ibid.* 2. The transgressing any Municipal Law, which prohibits that which either the Law of God, or the Civil Law, punishes criminally, by Corporal Punishment, or a Pecuniary Mulct, is a Crime, and thus the poynding Oxen in time of Labouring, was declared a Crime in the former Decision, because though it was prohibited by an exprest Statute, which did bear no Punishment; yet it ought to have been punished according to the Civil Law, whereby it is declared to be a Crime. 3. That is a Crime whereby the publick Peace is immediatly disquieted. Or whereby the Law of Nature is violated; Thus Incests, and Rapt, were accounted Crimes with us, before they were declared to be such by an exprest Law. And Bestiality, and Sodomy, are Crimes; though yet we have no Statute against them. 4. That is a Crime, which long custom hath punished, by Corporal Punishment, or by a Pecuniary Mulct, in the Justice Court, as single and not manifest Adultery.

From all which, it appears that the Law of God is the first fountain of our Criminal Law; And thus the Libel in single Adultery is only founded upon the Law of God. And in Usury we libel upon the Municipal Law, and the Law of God joyntly. 2. Our Statutes, or Acts of Parliament, are our proper Law;

Law; but even these may run in Desuetude, so far that they cannot be the foundation of a Criminal Pursuit, for former Transgressions, since the People who know not Law, so much by reading the Books of Statutes, as by seeing the daily practice of the Country, should not be ensnar'd by Pursuits, upon old buried Laws; which scarce Lawyers study or know. Nor can the People be thought to have contemn'd, what they cannot be presum'd to have known. And our Judicators, by ordaining such ancient Laws to be renewed by proclamations, do confess, that before these proclamations; these Laws were not binding: for else the renewing them had been unnecessary, and if it were otherwise, we have so many pœnal Statutes now in desuetude, that the Leidges would be certainly ruined by them. And thus Collonel Borthwick having pursued the Maltmen Criminally for contraveining the 92. *Act*. 6. Parliament, *Ja*. 4. The Council upon a supplication representing thir grounds, list'd that pursuit. But desuetude must be universal, ancient, and notorious, else the want of any of these three qualifications, will alter this conclusion. And yet I think that desuetude cannot *in futurum* abrogate a Crime, and enervate the Law altogether, since the Parliament only, can rescind their own Laws: nor should the people, nay nor our Judges; be made legislators, *consuetudinis ususque longevi non vilis est auctoritas, verum non usq; adeo sui valitura momento ut a rationem vincat aut legem. l. 2. C. qua sit long. Consuet.* which should rather hold in Crimes, than in any other subject, because it seems absurd, that it should be Lawful to the people, to loose themselves from the Laws made against themselves; and to gain impunity by frequent repetition of their faults: or to be able to free themselves from punishment, by contemning these Laws by which they are inflicted.

The Decisions of our Criminal Court, as of all other, do bind the same or succeeding Judges, rather out of Decency than Necessity; for nothing tyes Judges but Laws, and none can make Laws, but the Parliament, which is very suitable to *l. Nemo C. de sent. & inter.* where *Justinian* doth expressly command *ne ullorum iudicum sententia pro jure reputentur.* The reason whereof given in that Law, is *quod non exemplis, sed legibus est judicandum*, and the other reason *L. ult. C. de legibus quia imperator est solus legum conditor.* And if we consider how much Circumstances influence particular Cases, how Judges may fail where Parties are nam'd, and that Decisions pass necessarily upon less Premeditation than is necessary to Laws; it will be found reasonable, not to trust Decisions too much. Likeas our Judges, do make express Acts of *Sederunt*, as we call them, when they resolve to regulat future Cases; which were unnecessary if all Decisions did of themselves bind. Nor doth the Decisions of the very Parliament of *Paris*, bind even the Pronouncers themselves for the future, as *Conan* observes, *lib. 1. c. 15.* And so frail, and fallible a thing, are mens Judgements; especially where Votes are numbered, and not weigh'd: Or where Experience may discover the Errors, which the sharpest Reason could not foresee; that therefore Judges should no more be tyed from altering their Decisions, than Philosophers to continue in the Errors of their Youth. But yet when the Arguments *pro* and *contra* weigh equally, and Reason seems puzzled where to incline, the Authority even of our former Decisions, should cast the Ballance, especially where the same Reason then urg'd, was there pressed; and in the interpretation of Laws (of which Decisions are the best Interpreters) if a whole tract of Decisions can be produced, it would infallibly bind, wherein *Craig diag. de jure quo utimur* agree with *Callistrotus*, *l. 38. de leg. in ambiguitatibus qua ex legibus profisciscuntur consuetudinem, aut rerum perpetuo judicatarum auctoritatem vim legis obtinere.* Where these Decisions have proceeded upon a Debate; by which the Reason of Judges is much ripened, and the future Inconveniencies fully considered: for as *Pom-*

ponius well observes, l. 2. §. *his legibus ff. de origine juris, his legibus laus caput ut naturaliter evenire solet, ut interpretatio desideraret prudentium auctoritate necessariam esse disputationem fori.* And Durie in the case of *Hoom of Coudonknowes*, shews us how the L. of Session thought it not derogatory from their Honour, to retreat a Sentence after Debate, which they had pronounced, when no Advocats were compearing.

We follow the Civil Law in judging Crimes, as is clear by several Acts of Parliament, wherein the Civil Law is called the Common Law. And Robert Leslies Heirs are by the 69. *Act. Par. 6. Ja. 5.* Ordained to be forefaulted for the Crime of Treason, committed by the Father according to the Civil Law. And Forefaultor in absence was allowed by the Lords of Session, in Anno 1669. because that was conform to the Civil Law; and Falshood is ordain'd to be punisht, according to the Civil and Canon Law, *Act 22. Par. 5. 2. M.* And that the Civil Law is our Rule, where our own Statutes and Customs are silent, or deficient, is clear from our own Lawyers, as *Skeen Annot. ad l. 1. R. M. c. 7. ver. 2.* And *Craig l. 1. dieg. 2.* As also from our own Historians, *Lesly. l. 1. cap. leg. Scotor. Boet. l. 5. hist. Camer. de Scot. Doctr. l. 2. cap. 4.* And the same is recorded of us, by the Historians, and Lawyers of other Nations, as *Forcat. lib. 1. hist. Angle. Peter. diamitis Geograph. Europ. tit. D. Elscosse and Duck de auth. jur. civ. lib. 2. cap. 10.* And though the Romans had some Customs, or Cerims, peculiar to the Genius of their own Nation: Yet their Laws, in Criminal cases, are of universal use, for Crimes are the same almost every where, as *Boet*, well observes, *Leges Romanas à Justiniano collectas tanta ratione & Sermonis venustate esse, ut nulla sit natio tam fera vel ab humanitate abhorrens; quæ eas non fuerit admirata.* And *K. Ja. 5.* was so fond of the Civil Law, as *Boet.* observes, *lib. 17.* That he made an Act, Ordaining, that no man should succeed to a great Estate, in Scotland, who did not understand the Civil Law, and erected two Professions of it, one at Saint Andrews, and another at Aberdeen. And when James the 2. did by the 48 Act of his 3d. Parliament, Ordain that his Subjects should be governed by no forraign Laws, he designed not to debar the Respect due to the Roman Laws; But to obviat the vain pretences of the Pope, whose Canons and Concessions were obruded upon the People as Laws by the Church men of these times.

The 4th Branch of our Criminal Law, are the Books of *Reg. Maj.* which are in *Criminalibus* lookt upon as authentick. Thus the Thief must be punisht before the Recepter, and Assysers must be *parescuria*, &c. For which, and many other Maximes, there is no Warrant besides what is contained in these Books of *Reg. Majest.* But why should this be doubted, seeing they are cited as such, *Act 47. Parl. 6. Ja. 3.* Where it is said, that wilful and ignorant Assysers shall be punisht after the form of the Kings Law, in the first Book of the *Majesty*, and by the 98 *Act. 14. p. 1. 3.* Transgressions of that Act are to be punisht conform to the Kings Laws, and of *Regiam Majestatem*, like as by the 54 *P. 3. Ja. 1.* a Committee of Parliament is ordained to meet & examine the book of the Law, that is to say, *Regiam Magistratem*, and *Quoniam attachamenta*, which is repeated, 115. *Act. 14. P. 3.* And albeit they contain many things which are not in use with us; yet they have been in use, and this Objection would conclude the Acts of Parliament not to be our Law. It is then my Opinion, that *K. Ja. the 1.* hath brought down some of these Collections from England with him. Nor find I these Books cited before this time.

It is doubted whether the Secret Council can by any Act, or Proclamation, either introduce a Crime, which can infer tinsel of Life, or Elcheat; For the Parliament can only dispose upon our Lives and Fortunes. And it being the Representative of the Nation, every man is in Law, said to have consented, to what



what the Parliament doeth; I find *Craig* to have been of Opinion, that no Act of Secret Council can infer a Crime, pag. 38. Nor can the Council, by their Acts, warrant any to do what would be otherwise a Crime; for *ejus est nolle, ejus est velle*. And none can take away a Crime but such as can introduce a Crime, and therefore *Mr. Archb. Beath*, being pursued, for killing some men, he alledged, that these men, were bringing Meal from *Ireland*, And that by Act of Council, it was lawful to sink or kill such as contraveened the Act. To which his Majesties Advocate did reply, that the Acts of Secret Council, could not warrant the killing of a free Leidge, and the committing of murder: which reply was found relevant. But since the Council are to secure the peace, and that many accidents may emerge wherein the publick peace cannot be preserved without this power, it were hard to limit them too much.

IV. Whether *dolus* or a wicked designe, be requisite in all crimes; is largely treated of, by the Doctors, and is most fully debated, in the process of *Ochiltree*, *Balmerino*, and the Marquis of *Argyle*. And by the texts. §. *placuit just. de furt. l. 3. ff. De injur. l. pen. ff. ad. Leg. jul. de Adult.* It seems, that the wickedness of the designe, makes only an action criminal; but in my judgment, this inquiry may be resolved, in these conclusions; 1. That being man can only offend in what is voluntar to him, it must follow, that the will is the only fountain of wickedness. And consequently, it was at first the design of Lawgivers, only to punish such Acts as were designedly malicious. 2. Because design is a private, and conceal'd act of the mind, which escapes the severest probation. Therefore in some cases, this *dolus* is allowed by Law, to be inferred from conjectures, and presumptions, where the act is such, as of its own nature, may be good or evil, accordingly as it is circumstantiat: as in poyson, the giving whereof may be occasioned by ignorance, mistake, or malice. 3. Some acts are so irregular, of their own nature, that the Law requires only that the act be proved, without proving the *dole*, or wicked designe, as in Sodomy, Adultery, &c. 4. Some acts, though they be not wicked of their own nature, yet because the design cannot still be proved, therefore the contraveening the Law is equivalent to design, & *dolus presumitur contra versantem in illicito*, as the conversing with a woman after the Church hath forbidden the same, and therefore the Doctors divide *dolum* in *verum*, & *presumptivum*. 5. Where the Law hath expressly required *dole* and *designe*, there it must be expressly libelled and proved, as in the Act 37. Par. 2 K. *La. 2.* where it is statuted, that if any man wilfully receiv rebels, he shall be forfeited, but albeit *lata culpa*, be equivalent, to *dolus*, in lesser Crimes, yet the Doctors conclude, that where the crime may infer death, or mutilation (losse of life, or limb, as we speak) there the grossest negligence, or *lata culpa*, is not equivalent to *dolus*. *Clar. Quest. 84. Num. 7.* It is likewise much debated, whether an endeavour, to commit a crime, be a crime, albeit the effect follow not. And albeit, it be a rule, in the Civil Law, that *in maleficiis, voluntas spectatur, non exitus*, l. §. *divus ff. ad leg. Corn. de sicar.* yet is generally concluded by the practitioners of all Nations, that *simplex conatus*, or endeavour, is not now punishable by death: *Clar. Quest. 91. Gothofr. §. Conatus.* But for clearing this, according to the principles of reason, I shall form these conclusions, first, That all endeavour, is an offence against the Common-wealth: though nothing follow thereupon: albeit sometimes the punishment be conniv'd at, or mitigated, according to the several degrees of malice, but that it is in it self criminal, appears from this, that simple design is punishable in treason, and some other atrocious crimes; because in these, especially in treason, it would be too late, to provide a remedy, when the crime is committed. 2. In lesse atrocious crimes, the design is punish'd, if the committer proceeded to act that which approached nearly to the crime it self, *Si*

*deventum sit ad actum, maleficio proximum.* But this is not *simplex conatus*, but in effect is a lesser degree of the crime, to which it approaches; as if a thief, have put ladders to the house, which he resolves to rob; or if he mix poison, but the potion be spilt upon the ground by an accident: And albeit it be commonly received, that even in these cases, *affectus non est puniendus, sine effectu*, by the same punishment, with the crime designed: yet I would distinguish in this, betwixt an effect disappointed, by an intervening accident; and that which is stopt, by the repentance of the committer, for, where the design was only disappointed, I think the ordinary punishment, should not be remitted, in cases *ubi deventum est ad actum proximum* si nati ex actu in tu x. *Basil. de extraord. crim. l. 1.* And therefore the court of Savoy, did very justly condemn a thief, to be hanged, who had entered the house of one Girard to steal and murder, but was deprehended before the theft was committed *Goth. g. Conatus num. 16.* For since the punishment is only remitted in *conatu*, or endeavour, because of the favourable circumstance, that nothing followed thereupon. So I think this may be counterbalanced by the depravity of the design, in many cases. As if one should design to kill a whole family, or burn a whole town, and seing men are punished, not meerly for what is done, because that cannot be helped, as Lawyers affirm, but because, the committer of a crime, may commit the like; Therefore I conclude that he who designed to commit a crime, should be punished as if he had committed it; if he was only letted by accident, because the Common-wealth cannot be otherwise secure. And therefore it was admired, why in July. 1670. Mr. Stanfields servant was not punished with death for endeavouring to burn her Masters house, albeit she was apprehended before any prejudice was done: But I would here add, as a caution, that great premeditation, should be proved before *Conatus* be punished capitally; for that shoves the confirmed malice of the designer, and is æquivalent, as to him, to successe. 3. In mean crimes, vvhether the effect followed not, upon the design, but vvas hindred by repentance: I think little or no punishment should follow, for, *nihil tam naturale, quam unum quodq; eodem modo dissolvi, quo colligatum est.* The like should also hold, vvhether the design vvas taken up in passion or vvithout premeditation, because there the committer, is not for the future, so much to be fear'd: but this subject vvill be more fully cleared in the particular subsequent titles; for in some crimes, *Conatus* or endeavour, is more punishable than in others.

Whether what tends to a crime, though it be not arrived at the full guilt requisite, to make it fall expressly under the statute, or Law, by which that crime is punished, to which it approaches: has been oftentimes doubted. As for instance, to misconstrue His Majesties Government, and proceedings; or to deprave His Laws, is expressly declared punishable by death, by the 10. *Act. 10. P. 3. 6.* Whether then may not papers, as tending to misconstrue His Majesties proceedings, and Government, or bearing insinuations, which may raise in the people jealousy against the Government be punished by that Law? And that such *insinuations* and *tendencies* are not punishable criminally, may be argued thus. 1. It is the interest of mankind to know expressly what they are to obey; especially where such great certifications are annexed, as in Crimes. 2. The Law having taken under its consideration this guilt, has punished the actual misconstruing, or depraving, but has not declared such insinuations or tendencies punishable, & in *statutis, casus omisso habetur pro omisso.* 1. This would infallibly tend to render all Judges arbitrary, for tendencies, and insinuations, are in effect the product of conjecture: and papers may seem innocent, or criminal, according to the Zeal, or humour, as well as malice of the judger. Men being naturally prone to differ in such consequential inferences, and too apt to make constructions in such, according to the favour,

or malice, they bear to the person, or cause. Are not some men apt to construct that to tend to their dishonour, which was design'd for their honour, and to think every thing an innovation of Law, or privilege, which checks their inclination and design? Whereas some Judges are so violent in their loyalty, as to imagine the meanest mistakes to tend to an opposition against Authority. And thus zeal, jealousy, malice, or interest, would become Judges, if tendencies and insinuations were allowed to be Crimes. 4. Men are so silly, or may be in such haste, or so confounded; and the best are subject to such mistakes as that no man should know when he were innocent. Simplicity might of times become a Crime: and the fear of offending, might occasion offence. And how uncomfortably would the people live, if they knew not how to be innocent? Whereas on the other part, it may be represented, that there are some Crimes which cannot be determined as to all degrees of guilt. Such as is the misrepresenting the Government, which may be done so cautiously, and in such various, and different wayes, as cannot be specified in any statute. 2. If the misconstructing the Government be a great guilt, certainly, what tends to it must be punishable to some proportion. 3. It is the interest of the common-wealth that all disorders should be punish'd; and surely it is a great prejudice to the Government, that such insinuations, or tendencies, should escape unpunished. And as in the Civil Law, there are many Actions which have no definit and distant names, but are comprehended under the general names of *actiones in factum*; And that there are *actiones utiles*, arising from the reason of the Statute, as well as *directæ*, which arise from the words of the Law: So in criminals, there are Actions arising from the parity of reason, or at least, which inferring guilt in some degree, are sustain'd with us, *tanquam crimina in suo genere*. 4. The doing what may tend to misconstrue, or raise jealousies, is expressly declared punishable by the 60. *Act. 6. Par. Q. M.* whereby it is declared, that such as *few evil reports, tending throw raising such rumors, to stir the hearts of the people to sedition*. And by the 9. *Act. 20. Par. J. 6.* It is declared, that by the former Laws, every thing was declared punishable, which *tends to sedition, and dissention amongst the people*. And if endeavours be punishable, much more ought tendencies: since tendencies are express deeds. Nor hath the Judge more latitude, nor is he more arbitrary here, than he, & the inquest both are, in judging what is arte and part, for that is determined by no Law: and because it could not be determined, therefore a libel founded upon arte and part in general, was ordained to be sustained as relevant by our Statutes.

V. What persons may be punished, or are capable to commit Crimes; will be clear by determining what persons are not capable, and whether a minor may be punished for a Crime, is contraverted amongst the Doctors; and for clearing of the difficulty, we must distinguish betwixt such Crimes as are committed by contrivance, & *dolo malo*. And in these a minor is to be punished if the *dolo* can be proved, *l. un. Cod. si adversus dotem*. The sum of which Law is, that *ubi Minor deliquit per dolum; restitutio non procedit, sed ubi per culpam ibi subvenitur ei per restitutionem*. 2. In Crimes against the Law of Nature, such as Murder, A minor is liable though not to the ordinar punishment; but in merely statutory Crimes, such as usury, forestalling of Mercers, &c. he is not at all to be punished, except *ubi malitia supp'et aetatem*, which, because it is not presumable, should not therefore be inferred, but from very pregnant, and convincing probation. And being arte in all Crimes, seems to require judgement and contrivance; it would appear, that though the Crime it self were punishable in minors: Yet arte and part should not, being that, in effect, depends upon Acts of the judgment; wherein minors may be mistaken, because of their fragility, and less age: and thus John Rae was not put to



the knowledge of an inquest, for being arte, and part, of theft, because he was not the principal committer, but went alongst with his Father, and was not past twelve years of age, 1. *January* 1662. 3. Though a minor be punishable where he is *pubertati proximus*, yet he is to be punished more meekly; and thus the Viscount of *Frendraught*, was put to the knowledge of an Inquest, for being accessory to the way-taking and privat imprisonment of *Gregory*, though this was a statutory Crime. And thus *Midltoun*, And *Machan* were put to the knowledge of an Inquest. 26. of *August* 1612. and the 9. of *March*, 1671. It was found after a most contentious debate, that two boyes, the youngest whereof was not twelve years of age, should go to the knowledge of an Inquest, for casting down of a house at their fathers command: albeit it was alledged, that this act was not of its own nature criminal, as murder, or bestiality, but its guilt depended upon circumstances, which minors were not obliged to know, as if the house belonged to their father, of which they were informed, and so were not guilty. There are some Crimes also, wherein minors may be punished, and are reputed majors, *per fictionem juris* (according to the opinion of some Lawyers) such as fornication, adultery, sodomy, & *omnia delicta carnis*; because the guilt there consists in the commission of the fact, and not in a contrivance, and so minors may be equally guilty of these Crimes with majors. Yet I differ from these Doctors in this; for since the committing these Crimes, may be occasioned, by levity, and vacillancy of judgment in minors: and seeing furious persons would not at all be punished for such Crimes, I do think the age is somewhat to be considered, even in these cases; and that minors are not to be as severely punished, as majors; seeing they are not of so solid a Judgement as these are. I find, *lib. 3. Reg. Maj. c. 32. §. 15.* And in *annot. 100. vers. 3. c. 41. lib. 2.* that a minor is not obliged to answer for any Crime by which he may lose life or limb. And a case is there cited betwixt His Majesty and the Abbot of *Parbroth*, *annot. e. 13. v. 12.* And *Skeen* cites for this *l. pen. l. de autorit. int. & l. 1. §. occisorum ff. ad §. C. Sillan. & Cap. 2. de delict. puer. extrav.* The reason seems to be, because a minor may (being pursued whilst he is minor) omit some defence competent to him. And since a minor is not obliged to debate *de hereditate paterna*, whilst he is minor; much less should he be obliged to defend in a criminal pursuit, *ubi calore juvenili potest dicere vel tacere quod ei nocere potest.* So that it seems, that albeit a Minor may be punished for several Crimes committed by him when he was Minor, yet is he not obliged to answer for any till he be Major. But yet in the Viscount of *Frendraughts* case, it was found that a Minor was obliged to answer to an Inditement even during his Minority: But whether a Minor confessing will be restored against his Confession, is fully debated in the Title *Confession*.

VI. Such as commit any Crime whilst they sleep, are compared to Infants, *l. si. servus §. si fornicarius ff. ad l. aquiliam*, and therefore they are not punished, except they be known to have Enmity against the person killed; or that fraud be otherways presumable: *quo casu*, they may be punished *extra ordinem*, *Farin: quest. 82.*

VII. Such as are drunk, are sometimes for want of *dole*, and Malice, more meekly punished than others; especially if they were cheated upon Design, into that condition by others. And in this case the Law distinguisheth *inter ebrios*, who are rarely drunk, & *ebriosos*, who are habitually drunk: for these last should be most severely punished, both for their Drunkenness, and for the Crimes occasioned by it. But such as make themselves drunk upon design to excuse or lessen thereby the guilt they are to commit, merit no favour, and such as knew they were subject to extravagancy in their Drink, merit as little, *Cabal. cas. 297.* I have not in our Law found Drunkenness to defend in either cases;

And

And it was repelled in the pursuite of Murder pursued against the Laird of Spot and Douglas; for killing Hoom of Eccles. Anno. 1667. Yet I think that in some circumstantiat Cases, the Council may mitigat the Sentence upon this Account. But it is never a Defence against the Relevancy: Such as are Furious, are not in the construction of Law, capable to commit a Crime. *Stat. 2. Rob. 2.* for the Law compares them to Infants, or to dead Men, *lege si quis ff. de acqui- rend. hered.* to such as are absent, *l. sed si ff. de injuriis*, and makes them to be no more guilty because of the Crime they commit, than a Stone from a House, or a Beast is to be repute guilty and punishable for the wrong they do. *Quam si pauperiem pecus dederit aut tegula ceciderit, l. 5. ff. ad. l. aquil:* And the Law commiserats so far their Condition, that it expostulars with such as would pursue them for a Crime, & non exigas penas ab eo, quem sati in felicitas excusat, quique furore ipso satis punitur. *l. Infans ff. ad. l. Corn. de fisco:* They are excused by their own Misfortune, and abundantly punished by their own Fury: but since the Law protects furious Persons from Punishment, because they want all Judgement. *l. 14. ff. de officio prasid.* It follows naturally, that this privilege should be only extended to such as are absolutely furious. 2. It may be argued, that since the Law grants a total Impunity to such as are absolutely furious, that therefore it should by the Rule of Proportions, lessen and moderat the Punishments of such, as though they are not absolutely mad, yet are Hypochondrick and Melancholly to such a Degree, that it clouds their Reason, *qui sensum aliquem habent sed diminutum*, which Lawyers call *insania*, and the Greek *μωρεσις*. 3. That such as shew any Acts of Resentment, or revenge, in the wrong they do, may be punished with some degree of Severity; since they shew some degree of Judgment: But yet the Parliament of Paris is justly condemned by all Lawyers, for having caused execute a mad Man, who had killed one that had struck him two days before, but since he did shew Memory and Revenge in that Act, he might have been punished justly to some moderat degree. 4. Since there are some Mad-men who have lucid intervals, whose Fury has its Tides, and Waxes and Wanes, like the Moon upon which it depends; *quos furor, stimulis suis variatis vicibus accendit. l. 14. ff. de Officio prasidis*, that therefore they should be thought capable to commit Crimes when they are in their lucid Interval; but not when they are agitated by their Fury. But here it may be doubted, whether the Crimes committed by a Mad-man who has lucid Intervals, should be presumed to have been committed by him when he was in his Fury, or in his lucid Intervals, and the general Conclusion is, that though every man be presumed to be sound in his Judgement, till the contrary be proved, *quia qualitas que inesse debet, inesse prasumitur: Alciat prasump.* 1. Yet, when a Man is once proved to have been furious, the Law presumes that he still continues furious, till the contrair be proved, for Madnes is but too sticking a Disease; and is seldom or never cured. And this Presumption should rather hold in the committing of Crimes, than in any thing else; for the committing of a Crime, looks liker the Madnes, than the lucid Intervals. And yet if my Opinion were of Authority enough, I would limit this Rule in two Cases. 1. If the Madnes had fixt to an ordinary Interval, as the Hight of the Moon in Lunaticks, I would presume that if the Crime were not committed at that time, it behov'd to be presum'd it was committed in the lucid Interval. 2. If the person offended was one against whom the Offender had prejudice, in his lucid Intervals, or before his Madnes, or if he shew any Wit or Contrivance in the Execution of the Wrong he did, I would presume, that the Offence was committed in the lucid Interval: But because the Crime in these cases would be founded upon Presumptions, I think the Punishment should be lessened upon that account; and possibly that judge would not be much mistaken

staken who would remit something of the ordinary punishment in all Crimes committed, even where the lucid intervals are clearly proved: for where madness has once disordered the judgement, and much more where it recurs often, it cannot but leave some weakness, and make a man an unfit Judge of what he ought to do, *est tantum adumbrata quies, intermissio, sed non respicientia integra*: And as our Proverb well observes, *once Wood, ay the worse*.

It is Statute by the 24. Chap. Stat. 2. Rob. 2. That a mad Person shall be kept by his Friends, and if he commit any Wrong, it shall be imputed to his Friends, and Keepers; but though these may be made lyable civilly for any Damage the furious Man doth, as a Master is in Law lyable for the prejudice done by a wild Beast, which he keeps; yet it were too severe to punish them corporally for the Murders, and other Crimes which he commits, except where they are commanded by the Judge to keep him exactly, which ought not to be extended against such as are only his Curators, or nearest of Kin. *Berol. ad l. dionis, ff. de off. Praefid.*

It is generally agreed to by Lawyers, that furious Persons committing a Crime in their fury, cannot be punished for it, though thereafter they return to themselves: For in punishing Crimes, the time of the Commission is to be considered; though *Jason, Tirraquel*. And some others are of opinion, that if the Crime was very atrocious, the Mad-man recovering, may be punished. And for this they instance the Queen of *Castile*, who punished with Death, a man who had in his fury wounded her Husband King *Ferdinand*; and they cite *l. 14. ff. de officio praefidis*. But the instance is founded upon the Passion of a Woman; and that Law speaks only of Crimes committed in a lucid interval. And whereas *Caballus* thinks such a punishment necessary, for satisfying the Discipline of the Church; I should rather think, that the Church should of all other, least punish that Misfortune, it being against Christian charity, to add Affliction to the Afflicted. And it were brutish for Church-men to be more severe, than the Madness it self was, which was so charitable as to take its leave. As a Man should not be punished in his Health, for what he did when he was Mad: So upon the other hand, a Man who committed a Crime in his Health, ought not to be punished bodily, if he thereafter turn mad: For then he is not sensible of Correction, which is one of the great Designs of punishment. And to punish him then, were to endanger his Soul: nor would the People be deterred from Vice, but would rather be troubled with passion at such a Spectacle: but yet he may be punished in his Goods, *Clarus quest. 6.* Tell us of one who was scourged for Perjury, though it was alledged he was Mad, but this last seems too severe, for the Reasons foresaid; and since a Mad-man is lookt upon as absent, it may be justly doubted, whether he may be process'd during his Madness, for a Crime committed by him while he was in Health, even in order to the inflicting a pecuniary Punishment: and that because Absents cannot by our Law be try'd criminally: and because, Mad-men cannot inform their Friends or Lawyers, so as they may propone their just Defences. But since Absents may be tryed for Treason, by the late Act, it would therefore appear, that Mad-men may be likewise accused for Treason during their Madness; It may be likewise doubted if he who used any means to make himself Mad after his Sentence, may not be put to death, notwithstanding of his Madness, since that Madness was occasioned by himself, and so should not disappoint the Law. But *Clarus quest. 6.* is of opinion, that it ought to defend him from all corporal punishment, and *Caballus casu 298. Num. 27.* is also of opinion, that even he who commits a Crime whilst he is mad, though he himself occasioned the Madness, yet he is not to be punished by the ordinary punishment, for the Law



Law doth not presume that they made themselves furious upon design.

IX. Whether a collective Body of People, or university, such as a Burgh or Incorporation, may commit a Crime, seems debatable: And *Ulpian* seems to deny it *l. sed & ex dolo ff. de Doli Mal.* whose Words are, *sed an in municipes de dolo detur actio, dubitatur, ego puto, ex suo quidem non posse dare, quid enim municipes facere possunt.* But I conceive that we may clear this Point by these positions. 1. That properly Incorporations cannot commit a Crime; for they are *jus, non persona.* 2. Crimes which consist in Omission, may be fixed upon Incorporations, as if their Magistrates omit what the Law commands. *L. Jubenius. C. de Sacra-Sanct. Ecclesia. & l. si procuratorem ff. mandati.* 3. In these things which are proper only to be done by Incorporations, such as in making Acts, raising, and using unlawful Judicators: Incorporations may be said to be guilty of what their Rulers commit: *Consistit. freder. de Stat. & Consuet.* 4. Even these Crimes which are ordinarily committed by privat Men, such as Murder, Oppression, &c. are in Law sometimes charged upon the Incorporations; if these things be done by Command of the Rulers. *L. Metum ff. quod metus causa.* 5. No Deeds of the Magistrates can infer a Crime against the Incorporation, except the Body of the People concur: for they represent not the People in their Crimes, but in their Government: and they were not impover'd in their Election to commit Crimes. *L. si procurator §. Celsus ait. ff. de condit. indebit.* 6. If one Man oppose vvhhat may be a Crime, then the Incorporation cannot be guilty; for the University there cannot be said to offend: Since all concurr'd not, & in damno vitando, potior est conditio negantis.

How far Incorporations may be punished, may be likewise clear by these Positions. 1. The Incorporation offending, may be ordained to restore, in so far as they got Advantage. *l. Metum autem ff. quod met. caus. & l. sed & ex dolo. ff. de dol. mal.* 2. In these Crimes vvherein the Fathers may be punished vvvith the Children, such as Treason, Incorporations may be likewise punished, for their innocence is not more favourable, than that of Children. *Bartol.* gives several Instances, vvhwhere Towns have been for Treason condemned to be plow'd. 3. If an Incorporation offend in doing things that are only proper to be done by Universities, then the University may be punished, by Confiscation of a part of their Common-Good: but if an University should proceed to commit a Crime, vvhich is usually committed by privat persons, such as the going vvvith displayed Banners to oppress their Neighbours, then, as the Deeds of privat Citizens cannot vvvrong the Incorporation; so neither can the Deeds of their Rulers. And *Bart.* is of opinion, that if the Incorporation be fin'd, such as are innocent should not be lyable to pay any part of it, but it should all fall upon the Actors; *Arg. l. 1. ff. de Magistrat. conveniend.* for they were not impoverished in their Election to commit Crimes, as said is.

## TITLE II.

### The diviſion of Crimes.

1. Crimes are publick or privat.
2. Ordinary or extraordinary.
3. Capital or not capital.
4. Occult or manifeſt.
5. Atrocious or not atrocious.
6. Statutory and ſuch as are not puniſhed by expreſs Statute.

**C**rimines are divided by the Civil Law, into publick Crimes, and privat Crimes : publick Crimes are defined to be theſe, which any privat perſon may purſue, for publick revenge, and whereof the puniſhment is ſtated by an expreſs Law, §. 1. *inſtitut. de publ. jud.* And a privat Crime which none can purſue, but the Party injured, and which is not declared to be a publick Crime by an expreſs Law. But many of the Doctors, do of late conclude, that all Crimes which are puniſhable by the Statute of any particular Countrey, are *eo ipſo*, to be accounted privat Crimes, *ſtatuta enim ſunt leges judiciorum privatorum Bal. ad leg. ult. Cod. qui reſta fac. poſſ.* Yet this appears to be a miſtake, for if a Statute ſhould allow any perſon whatſoever to purſue the Crime, therein forbidden ; that Crime would be doubtleſs a publick Crime, for the true notion of a publick Crime, ſeems to be that, wherein the Common-wealth is immediatly concerned either by Intereſt, or Example ; by Intereſt, as in Treason, or coining of falſe Money ; by Example, as in Murder, Witchcraft, &c. In which, though the Common-wealth be not immediatly concerned, as a Body, yet every particular perſon of that Body is concerned ; becauſe he who committed that Crime, may commit the ſame again, & ſemel malus ſemper preſumitur malus, in eodem genere malitia. So that every ones having power to purſue a Crime, or a Crime being declared publick, by an expreſs Law, are not the true conſtitutive differences, betwixt a publick Crime, and a privat ; but are only the effects thereof : for when the Kingdom, or State, doth ſuch that any Crime, is of dangerous, and univerſal conſequence, then they allow, very juſtly, that every privat man may accuſe. With us in Scotland, the veſtiges of this diſtinction, are yet to be ſeen. For albeit his *Majeſties* Advocat may purſue without the concurſe of the Party injured : Yet no other perſon will be allowed to purſue any Crime, *niſi ſuam vel ſuorum injuriam proſequatur*, and that every privat perſon, may not purſue in all Crimes ; is clear, from c. 2. lib. 4. *Reg. Maj.* where in Treason, it is ſaid, that every man may purſue, which had been unnecesſary, if every perſon might purſue in every Crime, and thus *Meal* having raiſed Letters in his own name, againſt *Charles Lindſay*, for killing his Father, in July 1668. the Juſtices would not ſuſtain the Purſuit at his Inſtance, becauſe he could not prove that he was Son to the Deſunct, and ſince his *Majeſties* Advocat, represents in all criminal Purſuits, the Publick : and as it is preſumable, that he will not reſuſe his concurſe, ſo he will be puniſhed, if he reſuſe the ſame. It were therefore inconvenient, and unnecesſary, that every privat man ſhould be allowed the liberty, of purſuing Crimes, in which he were not intereſted : this diſtinction is much abuſed in the Books of *Reg. Maj.* For in them publick Murder is defined to be that, which is committed by forethought Felony : and privat Murder, which is committed

committed without being known to any, but the persons who were Complices, *Stat. Malcom. 2. c. 15.*

II. The civil Law, likewise divides Crimes in ordinary, and extraordinary; extraordinary were these wherein the Law had appointed no particular Punishment; ordinary Crimes were such as were punishable by a liquid Pain, determined by the Law, and was therefore called *crimen legitimum*.

III. Crimes are likewise divided, into such as were capital, or not capital. Capital crimes are such, as are punishable by Death, Banishment, or loss of Liberty: so called à *capitis diminutione*; but with us these crimes are only called capital, which are punishable by loss of Life or Limb.

IV. Crimes are either occult or manifest: occult crimes are these, which either are occult of their own nature, as Hamefucken, Conspiracy, Adultery, or such as are occult by accident, such as Murders committed by Inn-keepers upon their Guests. Though Murder of its own nature be not occult, since it is oft-times openly committed. This division is considered by Lawyers, either in order to Probation; because in occult crimes less exact Probation is accepted: And thus with us the being rob'd at Sea was found probable by these in the Ship, because no other Probation could be had there. And it is against the interest of the common-wealth that crimes should pass unpunish'd: Or they consider this division with respect to Prescriptions, because it is debated whether when a Statute appoints a crime to be pursu'd betwixt and such a day, that time should run in occult crimes, from the time the crime was committed, or from the time it was known. In occult crimes also, Torture is admitted more easily than in others Crimes.

V. Crimes are divided in such as are atrocious, and such as are not. Atrocious crimes are these where the Guilt is very great.

VI. In Scotland, crimes are divided in statutory, and such as are not punished by an express Statute, as common Adultery, Bestiality, &c. And albeit it was controverted in the Lord *Renton's* case, Jan. 1666. that the Poynding of Oxen in the time of Labouring, could not be accounted a crime, because it was not declared punishable by an express Statute; yet the Justices found, that *eo ipso* it was forbidden by a Statute: It was in so far a crime, because Authority was thereby contemned, especially having been formerly declared a Crime by the Civil Law. And it were unreasonable to think that Adultery, albeit it be not notour, should be a crime, albeit its Penalty is not express by a Statute. And with us especially of old it was most ordinary to forbid crimes without express Sanctions, as may be seen in several Acts of Parliament: Like as by the Civil Law, extraordinary crimes were declared to be such, as were forbidden by Law, but where the Penalty of the Law was not determined; from all which it appears, that the essence of a crime consists in its being forbidden, and not in having its punishment stated by an express Statute, though I wish it were otherwise.

What Crimes are called Crimes of the Crown, or Pledges of the Crown, is treated largely *Title Regalities*; What Crimes are called *Crimina excepta*, is declared in the *Title Treason*.



# TITLE III Blasphemy.

- 1 What is Blasphemy?
- 2 The several kinds of Blasphemy.
- 3 Whether Ignorance, Repentance, or Railery be good defences against the Punishment.
- 4 What is the Punishment of Blasphemy, by the Common-Law.
- 5 What by our Statutes?
- 6 Cursing of Parents, and Swearing, how punished?

**B**lasphe-my is called in Law, *divine lese Majesty*, or *Treason*; and it is committed either by denying that of God which belongs to him, as one of his Attributes: or by attributing to him that which is absurd, and inconsistent with his Divine Nature.

II. These who swear by the Head, or Feet of God, are guilty of this Crime by the common Law, c. 51. *si quis per dei capillum* 22. *quest. 1. videntur enim amplecti anthropomorphitarum hæresin, quæ membra deo tribuebat*: By that Canon Law they are also punishable, who delate not Blasphemers. Albeit regularly what is spoken in Passion be more moderately punished, yet it lessens not a Blasphemers Crime, *Hosien. tit. de maled.* except he speak at such a rate, as clearly indicates that he is furious, or somewhat distracted: or if he recover himself, and testify immediately his Contrition; thus *Socin.* relates *consilio* 102. that a Jew who had denied the Omnipotence of God, was absolved from a Pursuit of Blasphemy, because he immediately threw himself upon the Ground, and kiss'd it, and testified an extraordinary horror, which Lawyers say, is an extraordinary Punishment, and oftentimes exceeds the fear of Death. And there are some Lawyers, as *Abbas & felin ad cap. 13. de jure jur.* who conclude, that either he who Blasphemes passionatly, is unlawfully employed when he falls into that Passion, as in playing at Cards, Drinking, &c. and then his Passion doth not lessen his Crime: But if he be honestly employed, as doing Business, treating for his Friend, and then if he blaspheme only in Passion, it lessens his Guilt, and should mitigate his Punishment: but why should Passion excuse Blasphemy more than Murder; if it be not because the fall cannot be repaired by Repentance, a man being killed, but the fault in Blasphemy may be extinguished by Repentance.

III. *Clarus* thinks that these who Blaspheme in Jest are to be less severely punished; and that Rusticity mitigates the ordinary Punishment in this case; but *Gothofredus* is, as to the last, of a contrary opinion, because Rusticity excuses not from the knowledge of the Law of Nature, much less of God, but they may be reconciled thus, that open gross Blasphemy, is equally punishable in both; but not consequential and indirect Blasphemy, as if a Countrey-man should err in the Persons of the Trinity, which some remote High-landers are so ignorant of, as not to know, those should rather be pitied than punished, except they add obstinacy to Blasphemy, *vid. Cabal. cas. 296.*

IV. The punishment of Blasphemy, is Death by the Law, *Nov. 77.* by the Canon Law: Publick Repentance for the first Fault, and the standing at the Church-Door, with an infamous Mitre, or Paper Hat for a Relapse.

V. By

V. By our Act 21. *Seff. 1. Par. 1 C. 2.* Blasphemy, Railers against God, or any of the Persons of the blessed Trinity, shall be likewise punishable by Death, if they obstinately continue therein. From which Act it is observable, 1. that this Crime can only be tried before the Justices; and therefore not before the Lord of a Regality, though they have equal Power, as hath been formerly observed. 2. Distraction is only excepted here, for Ignorance, Passion, Rusticity, or Railery excuses not; *nam, exceptio firmat regulam in non exceptis*, and yet these may excuse from the ordinar punishment, in some Circumstances, but are never Defences against the Relevancy. 3. It may be doubted, why the denying God, or any of the Persons of the Holy Trinity, is only punishable by death, if they continue obstinate therein. And yet the railing upon, or cursing God, or the Trinity, is simply punishable, without obstinacy: and the difference seems to be, that Cursing, or Railing against God, cannot proceed from Ignorance, but argues Malice: whereas the denying Gods Attributes, or the Trinity, may proceed from Ignorance.

It may be doubted, if with us a person who should call himself the Son of God, or the Messias, could be punished as a blasphemous, and it is said that the Parliament of England thought he could not: and therefore James Nailor was only scourged for this Crime. Yet I think he could be reached by our foresaid Act, as a person who railed upon God, and the Trinity, For to make ourselves equal with them, is to rail against, and vilify them.

VI, Cursing of Parents, *viz.* Father, or Mother (but no others) is punishable by death, if they be past sixteen, or arbitrarily if they be below sixteen and above Pupillarity, (*videt. parricid*) Act. 20. Par. 1. *Seff. 1. Ch. 2.*

Justices of Peace are by the 38. Act. 1. Par. Ch. 2. to punish such as curse & swear profanely, and exact from a Nobleman twenty merks, a Baron twenty merks, a Gentleman, Heretor, or Burges ten merks, a Yeoman fourty shilling, a Servant twenty shilling, a Minister the fifth part of his Stipend, and the Husband must pay his Wifes fine, *ergo regulariter*, the Husband is not liable for the Wifes fine, if there be no warrant therefore by Statute. By the 16. Act. 5. Par. Q. M. the swearing abominable Oathes are to be fin'd, but that Act is only temporary. By the 103. Act. Par. 7. J. swearers and blasphemers are to be punished by the Magistrats, and if they fail, by the Privy Council. Not, by this Act, that Women are to be punished in poenal Statutes conform to their Blood, and their Husbands quality; that is to say, conform to their Blood if unmarried, or to their Husbands quality if married: and therefore may be doubted, whether these Women who have precedency according to their Birth, though married, as an Earles Daughter, when married to a Gentleman, or those who have precedency by a patent, above their Husbands quality, should not be punished according to their precedency, though married.

The Justices did in May 1671. fine a Woman in Dumfries, in 500. merks for drinking the Devils health, but did not find it Blasphemy.

## TITLE IV.

### Heresy.

- 1 *The definition of Heresy.*
- 2 *Whether Invocation of Spirits be Heresy.*
- 3 *The punishment of Heresy.*
- 4 *Jesuits and trafficking Priests how punished.*
- 5 *The specialities introduced in punishing this Crime.*

**H**eresy is committed, when a Christian owns pertinaciously errors condemned by the Church. I said when a *christian* own'd them, because Pagans and Mahumetans are not punished as Hereticks. *Simancas de hereti cap. 31. num. 3.* for these are enemies to our faith in general, and erre not in particular points of it. I said who err'd pertinaciously, because such as erre ignorantly or as having err'd perversly, do not pertinaciously adhere to their error; are not to be esteem'd hæreticks. And this repentance is to be received any time, even after sentence to stop the Execution. *Carer. fol. 642.* except they have relaps'd in their Heresy, for their second fall is not to be taken off by repentance but though their Repentance secures them against death in the first fall, yet they are to be punished by perpetual Imprisonment, *Ignens: in: l. ff. ad Sillan Cook. hoc. tit.*

II. Though some make the adoration, and invocation of Spirits to be Heresy, yet others do more judiciously determine that if these devils be invoked to reveal things to come, then that invocation is of the nature of Heresy, for that is to attribute omniscience to the Devil, which is one of Gods attributes, but if the Devil be invoked for a particular end, or interest, such as that he may learn the invoker how to prevail with a mistress, or how to gain a Princes favour, in these cases the invoker is not to be call'd a Heretick. *Clarus. §. Hæresis. num. 25.* but neither do's that distinction please me, for such as invoke the Devil are not properly Hereticks, especially if they have renounced their Baptism, for there is no reason to call them Hereticks who not only erre in the faith, but have renounced the faith intirely, and as Pagans are not Hereticks because they worship false Gods, so neither should they worship the Devil, and these who have renounced their Baptism, for they are in the same condition with these who were never baptized.

III. The punishment of Heresie, in the opinion of the Doctors, is to be burnt, and confiscation of the Delinquents Moveables, *Clar. num. 13.* But by the Law of England, Hereticks are only to be burnt if they will not abjure.

By our Law Heresie was in the first instance try'd by the Church, and the Secular power did not meddle to condemn Hereticks, till they were first condemned by the Church, *Ja. 1. Par. 2. Act. 28.* In which it is ordained that the Bishops shall inquire into Heresie, and if they be found, that they be punished as the Law of the Holy Kirk requires: and if it misfirs, that Secular power be called in support, and helping of holy Kirks.

From which Act it is observable, first, that the Kirk was Judge to Heresie, in *prima instantia*, during Popery: and this is conform to the opinion of almost all the Doctors, who think heresie, *crimen mere Ecclesiasticum*, *Alciat. inc. 1. num. 37. de offic. ord.* but they justly conclude, as in this Statute, that the cognition belongs to the Church, and the punishment to the secular Judge; &c  
this



this Canonists call *tradere hereticum brachio Seculari*: and *Clarus* do's so far appropriat this tryal to the Ecclesiastical Judge, that he allows not so much the Secular Judge as the power of mitigating the punishment: and yet now the Justices are judges competent, *in prima instantia*, to such as hear or say Mals, but the reason is, because such are in general condemn'd by the Church, as guilty of Heresie, and yet the Popish Church are still Judges to the Protestants, though they be condemn'd in general as Hereticks; for the Hereticks are try'd and condemn'd first by the Ecclesiastick Judge among them.

The second thing remarkable in this Act, is, that amongst Ecclesiasticks, the Bishop is the first Judge in Heresie, which is also conform to the opinion of the Canonists, *Clar. b. t. num. 5.*

After the Reformation, there was a Confession of Faith made, and is set down by King James in his first Parliament, and Ratified *Act. 4.* And they who profess not the true Religion may not be a Judge (but this is not extended to Heretable Offices) Procurator, nor Member in any Court, *Ja. 6. Pa. 1. c. 9.* and such Church-men as will not subscribe that Confession, are deprived, *Ja. 6. Pa. 3. Act. 46.* and all such as refuse to subscribe, are to be reputed Rebels and enemies to the King and his Government, *Act. 47.*

IV. Our Law fearing the pains taken by the Romish Church, more than hazard arising from any else, have been more severe to these, than to others: And therefore the sayers or hearers of Mals, or such as are present thereat, are punished, *5. Act. 1. P. 7. 6.* by confiscation of all their goods, moveable and immoveable, and an arbitrary punishment of their persons for the first fault, banishment for the second fault, and death for the third fault. It may be doubted, if such as hear Mals for curiosity, may be thus punished, which is very ordinary abroad; and it seems that Heresie must be an act upon design, and yet this Law makes no distinction here. 2. It may be doubted, if by confiscation of Goods immoveable, be meant Land and Heritages, for they are call'd *bona immobilia*: and yet I rather incline to think that this should only extend to Heretable Bonds, and such like, but not to Lands: for Heritage uses always to be exprest distinctly, when the confiscation of it is design'd: And if Heritage were forfeited by the first fault, the punishment of the first fault would be greater than the punishment of the second fault, which is only banishment: Nor do's Heritage use to be exprest under the word Goods. But thereafter the sayers of Mals, and trafficking Papists, and the receivers of them against the King's Majesty, and Religion presently profess'd, are declared guilty of treason. *Act. 120. Pa. 12. Ja. 6.* But from these words, *Against the Kings Majesty, and Religion presently profess'd*, it may be argued, that only such Jesuits and others, as traffick to the prejudice of the Kings Person, and Government; such as these who attempted the Gun-powder-treason, or to kill the King, or raise Rebellion, are only guilty of Treason, which seems the rather, because it were hard to make simple endeavouring to perswade others in meer matters of Religion to be treason. It is also observable from this Act, that such Jesuits, or trafficking Papists, or receipters of either, as satisfies the King and Kirk, are not to be guilty of treason; so that here treason is taken avay by repentance: but it may be doubted, if though they be not guilty of treason, they may not be punish'd as Hereticks, conform to the above-cited *5. Act. 1. Pa. Ja. 6.* for the Act only declares that the penalty foresaid shall not strike against them. And though (as I observed formerly) such as are guilty of Heresie, may by repentance save themselves from the punishment of death, yet are they still declared lyable to other punishments such as perpetual imprisonment. But yet since our Law appoints no other punishments against Traffickers, and receipters of Jesuits, but what is exprest here, and that the punishment here exprest is taken off in case of repentance; I rather believe that no punishment can be inflicted, in case of repentance, against these. And it is very reasonable, that

meer errors in faith should be pardon'd by meer repentance; but as to the sayers and hearers of Mass, the former Act seems to stand.

The Sellers also, and Dispersers of erroneous and Popish Books, are to be punish'd arbitrarily, by the Rubrick of the 25. Act 11. Pa. Ja. 6. but the statutory Words run only against the Home-bringers of such Books, the Books also are to be destroyed, and Warrant is given to Magistrates of Burghs with a Minister, to intromet with them without hazard of Spuilzie: But yet *de practica*, other Officers, such as Sheriffs, and Lords of Regality do intromet with such Books, though they be not warranted. And though *inclusio unius est exclusio alterius*, and though the Act ordains a Minister to be present (which was certainly appointed that it might be known whether the Books were Popish) yet *de praxi*, Magistrates use to intromet without having a Minister present.

I find no express punishment against other Hereticks in our Law, nor *de praxi*, are other Hereticks punish'd corporally; but whether they may not be punish'd conform to the common Law, and upon that general Act of K. James the First, I will not determine. As also, it is ordinary to banish only Jesuits, and Sayers of Mass, as was done December 9. 1573. Mr John Robertson was banished by Order from the Council, he enacted himself under the pain of death never to return to Scotland.

V. The Common Law, or Doctors have introduced many Specialities in in the Tryal of this Crime, as first, that less clear Probation is admitted in proving Heresie, than other Crimes, *Clar. §. Heresis, num. 20.* And by an old Act of *Sederunt, socii criminis*, Women, and Pupils, are to be admitted with us, to prove Hearing, and Saying of Mass, else that Crime could not be proved. 2. A Heretick may be try'd after Death, *Alber. in rubr. h. t.* which they say holds not only in a Heretick found guilty by probation (*Hereticus verus*) but in these who were cited to compear for Heresie, but compear'd not, whom they call *Hereticum Presumptum*, but this holds not with us, no not in these who are guilty of Treason, as being Traffiquing Jesuits or Papists, for only Perduellion is by our Law to be try'd after death: But though the Heretick cannot be punish'd after death, yet his Opinions may be condemn'd, as Heretical, even after his death.

## TITLE V.

### Simony, Baratry.

- 1 What is Simony?
- 2 How it is probable.
- 3 The nature and punishment of it in Scotland.
- 4 Baratry Ecclesiastick.
- 5 Baratry Civil.

**S**imony is the Selling or Buyiug any Church Office, *cupiditas emendi aut vendendi aliquid spirituale aut spirituali annexum.* So called from Simon Magus, who offered to buy the Grace of God. And the Canonists teach, that it is Simony to paction for any Advantage in administrating the Sacraments, but not to take Reward after they have administrate them.

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II. In this Crime, infamous Persons, Whores, and other Witnesses, who are not *habiles*, or, at least, who are not *omni exceptione majores*, are here receivable. *cap. sicut. de Simon.* Because it is ordinarily carried on with much privacy, and clandestine dealing, for which reason likewise, Lawyers conclude, that it may be proved by Presumptions. It is *crimen mere ecclesiasticum*, and cannot be punished by Laicks, the punishment is Deprivation.

III. With us, Simony is once mentioned. and that is, *Act. 1. Par. 21. Ja. 6.* Wherein it is Statute, that if the Arch-bishop, or Bishop deprehend that the person who is presented, hath made any Simoniackal Paction with the Patron, whereby he hath so hurt the Benefice, as that he hath not reserved a sufficient Maintenance for himself, and his Successors, suitable to the Value of the Benefice, that the Bishop may refuse the Presentation, and the Lords of Session are declared to be Judges to any Debates arising betwixt the Bishop, Patron, and Person upon that account. From which Act it is observable, 1. That it is implied, and tacitly acknowledged, that Simony is a Crime by our Law, seeing this is punished as a Branch thereof: and therefore I Conceive, that whatever is punished as Simony by the Canon Law, is punishable with us; and that a Minister, or other beneficed Person who bargains, or transacts with any to get them a Church, or Benefice, and gives or promises Money therefore, is punishable even by our Law. 2. That by this Act, a Paction, whereby the Incumbent reserves to himself, a Competency suitable to the Benefice, is not Simony; and what this Competency is, is left arbitrary to the Judge, because it is not determined. 3. That this Crime is probable with us by Oath, because of its clandestine Convoyance, as said is. By the *Stat. Eliz. 31.* The person committing Simony, is declared incapable to enjoy that Ecclesiastick Office.

IV. Baratry is a kind of Simony, (*Socius reg. 55. Bald. part. 5. Consil. 21.*) which with us is committed by these, who go to Rome to buy Benefices, without Licences from the Chancellor, or their ordinar, *J. 1. P. 7. cap. 106.* the pain of it is Banishment, and never to bruike Honour, or Employment for the future, within the Kingdom. This Word comes from the Italian Word Baratry, which signifies, corrupting of Judges, for our Law presumed, that these who went to Rome to get a Benefice, designed to get it by corruption. But though Baraters are called *caupones beneficiorum* by the Doctors; as *Craig* observes, *pag. 371.* Yet our Kings being of old very submissive to the See of Rome, durst not directly at first, forbid Application to Rome; but did only forbid the carrying abroad Money out of the Kingdom; knowing that nothing could be done there without Money: But thereafter this Crime growing greater, the Parliament did by the *84. cap. p. 6. J. 3.* forbid expressly the going to Rome, to purchase Benefices, or to be its Collectors, under the pain of being demean'd as Traitors, and never to bruike Benefice, or use Worship; which is ratified by the *53. Act. 5. P. J. 4.* But though the punishment is that of Treason, by these Acts; yet by the *2. Act. 1. P. J. 6.* The punishment of Baratry, is declared to be Prescription, Banishment, and never to bruike Honour, nor Office within the Kingdom: And all Applications to Rome are punishable as Baratry. This Act being after the Reformation. And by this last Act, it is declared that Baratry may be punished either by the Justices, or Lords of Session. And upon this Act *James* Arch-bishop of *Glasgow*, was exauctored after the Reformation, for going to Rome.

V. The Sons of Noblemen, and others passing to Schools beyond Sea's without the Kings Licence, are also said to commit Baratry, *J. 6. P. 6. cap. 71.* And the Council uses to ordain Noblemen, who breed their Children abroad, in Popish Schools, to bring them home under a great fine, as they did lately to the Lords of *Mordingtoun*, and *Semple* in anno 1668. Before which Act



also, all Laicks going out of the Kingdom, without consent of the King, or Licence from the Chancellor, committed Baratry. *J. 4. P. 5. cap. 53.* And though *Craig* debates *pag. 371*, whether the punishment of this be the same with Treason, because it is said to be punishable as Treason. *cap. 84. P. 6. J. 3.* Yet it is clear, that this punishment is restricted by the *Act 2. P. 1. J. 1.* To the being declared incapable of Trust, and Banishment. This Prohibition of Laicks going abroad, was first at *Carthage*. And is now in vigour at *Naples*, and many other places. And though it be now in desuetude, at least is not punished, except in privy Councillors: Yet I see no Reason, why any should say, that this Crime takes only place in Vassals, holding immediatly of the King; for the Act is general. And yet Merchants are warranted by divers Acts of Parliament, to Traffique abroad, and so fall not under this Prohibition.

## TITLE. VI.

### Treason.

#### *Lese Majestas.*

- 1 *Treason is divided by the Civil Law in Perduellion and Lese-Majesty.*
- 2 *The differences betwixt Perduellion and Lese-Majesty.*
- 3 *Treason with us may be divided in Perduellion, Lese-Majesty, and Statutory Treason.*
- 4 *The Nature of Perduellion, or rising in Arms, which is the first Species of Treason.*
- 5 *The second Species of Treason is committed against the Kings Person.*
- 6 *The third is the receiption such as have committed Treason.*
- 7 *The fourth is to hold out Houses against the King.*
- 8 *The fifth is to assail Castles where the King resides.*
- 9 *The sixth is to raise a Fray in the Kings Host.*
- 10 *The seventh is to trouble any who kills a declared Traitor.*
- 11 *The eighth is to impugn the Authority of the three Estates.*
- 12 *The ninth is to decline the King or Councils Authority.*
- 13 *The Tenth is to Conceal, and not Reveal Treason.*
- 14 *The eleventh is to desert the Kings Host.*
- 15 *The twelfth is to deny the Kings Prerogative, in having the sole power in calling and dissolving Parliaments.*
- 16 *How the killing Counsellors is punishable.*
- 17 *The several Branches of Statutory Treason.*
- 18 *To accuse any man for Treason, if the accused be assolized, is Treason.*
- 19 *Treason is not Baleable.*
- 20 *Summons of Treason ought to be execute by Heraulds.*
- 21 *Whether less probation be sufficient in Treason than in other Crimes.*
- 22 *Treason may be pursued after the Committers death.*
- 23 *Traitors may be foresuited in absence.*
- 24 *How disobeying the King is punishable.*
- 25 *The punishment of Treason in general.*

U Nhappy man retains in nothing so much a desire to be like his Maker, as in that he would be Supreme: & no wonder that this Crime should be incident to

to him in this lapsed condition, when his will is crooked, and his Judgement blind; since the very Angels in their purity, and Man in his innocence, were tempted by it: so that since men have subjected themselves to Government, we may easily conclude they found a great convenience in this submission; else they had never offered so much violence to their own inclination. To Societies, and Laws; we owe every moment the preservation of our lives and fortunes, which nothing but Discipline does secure: and without an intire submission, these Societies would be but Companies of Robbers, and Laws but meer toys. How many dangers do Governours incur? And by how many cares and fears are they disquieted? Wherefore it is must just, that those who Govern, should be more secure against their Subjects, than against their enemies, since they may be most easily wrong'd by these who live in their own bosome, and who have easie and open access to them. In other Crimes, one or at most few, are wrong'd: whereas in rebellion, and *Lese Majestie* the whole Society is offended. And therefore it was most just, that those who design the ruine of the Common-wealth, or the Supreme Governour (which Crime we call Treason) should of all others be most severely punished. And the *Basilicks*, l. 1. h. 1. observes well, that Treason is a kind of Sacrilege, *οτι τῶν επιβαλόντων τῷ βασιλεὶ τὴν ἐξουσίαν, ὡς τοῖς τοῦ περι ἀποστασίας.*

I. Treason was by the Civil Law divided, in *Perduellionem*, & *Lesam Majestatem*. *Perduellionem* was that Treason which was committed against the Prince or Common-wealth immediatly: *Adversus Populum Romanum, vel securitatem ejus*. *Lese Majestie* (as opposed to *Perduellionem*), was committed by speaking against the Prince, revealing his secrets, &c.

This Crime was punished *per legem Juliam*; the branches whereof are the raising of Arms against the State, the being in accession to the flight of such as were Hostages to the Common-wealth, or to the killing of any Magistrats of the Common-wealth, the keeping correspondence with the enemies, the continuing to govern a Province after a Successor was named; the Levying of an Army, and running into the Enemies. All which are expressly enumerated *ff. ad leg. Jul. Majestat.*

II. Betwixt these two, *Hottoman* assigns these four differences, 1. That *Perduellionem* was that whereby the Common-wealth was in general wrong'd, *qui summam rei publice labefacere conati sunt*. *Lesa Majestas* was that whereby the Common-wealth was only wronged in a part, or by consequence; as to suffer the enemies of the Common-wealth to escape, or to conceal them, &c. The 2. is, the Crime of *Lese Majestie* might have been pursued before the ordinary Judge *in foro*; but *Perduellionem* could not be pursued but in the great Meetings of the People, *à populo Romano, comitiis centuriatis in campo Martio*. Whence probably did arise the judging Treason by Parliaments with us. The 3. was, that the Crime of ordinary *Lese Majestie* was not punished with death, as *Perduellionem* was, but with banishment. The 4. was, that the ordinary *Lese Majestie* was punish'd by death, but *Perduellionem* was punishable after death.

III. Treason may be with us divided in *Perduellionem*, which we call High Treason, called by the *English* Law *alta prodition*, or rebellion, which is only with us a rising in Arms against the King; and in ordinary Treason and *Lese Majestie*, such as to conceal, and not reveal Treason. And in Statutory Treason, which is not Treason properly of its own nature, but is declared to be so by a particular Statute, as is that of Murder under trust, Theft in Landed-men, &c.

IV. *Perduellionem* in the Civil Law, is that which we call Rebellion in our Acts of Parliament, and it was so called *extravagan. Hen. 7. qui sunt rebelles*: And there it is statute that *rebelles & infideles, imperii, qui quomodocunque ali-*

*quid machinantur contra prosperitatem imperii.* But I find not the word *Rebellion* used in the Law before that time. Yet sometimes Rebellion is in our Law taken for that which is committed against the Kings Person, as in the 3. *Act*, 1. *Parl. K. Ja. 1.* where it is said, No man shall rebell against the Kings Person openly, nor notourly: But the Adverb there used *openly and notourly* in that, and the subsequent Acts, interprets sufficiently the word rising against the Kings person, to be the same with us that is called *Perduellion* in the Civil Law, viz. *Si quis hostili animo adversus principem, vel rempublicam animatus sit.* To raise Arms against the King then, or to rise in open rebellion, is the first and highest degree of *Treason*, *Ja. 2. Par. 6. Act. 25.* where it is called a *Raising* in fear of War against the King; which Act comprehends all the kinds of *Treason*, like *lex prima ff. ad L. Jul. Majest.* And therefore I will follow that method. And though it be added in that Act, that it shall be *Treason* to rise in fear of War against his Person, or Majesty, of whatever age he be of, without the consent of the three Estates: Yet the consent of the three Estates will not defend the rising in Arms against the King, as was found in the case of the Marquis of *Argyle*, being pursued upon this Act, in *Anno 1662.* for rising in Arms against the Marquis of *Montrose* then the Kings Commissioner. For the Analysis of that Act must run so, as that these words, *Without consent of the three Estates*, cannot be added to all the former Treasons committed against the Kings person, which are contained in that Act; For many things in that Act could not be justified by the Authority of the three Estates, for elie the three Estates, and not the King, would be Sovereign: for they only are Sovereign, against whom *Treason* can be committed. But these words must only be taken as added to the last Crime prohibit, which is the assailing of the Castles, or Houses where the Kings Person is, which may be lawfully done by Authority of the Estates. For if the King being very young, were taken Prisoner, as our Kings oft-times were in their minority, it had been absurd to think, that these who went to assail, by the authority of the three Estates, that Castle where the Kings Person was, should be punish'd as Traitors, because of their obedience. But to suppress all pretext that might arise from that Act, it is declared by the 5. *Act*, 1. *Parl. 1. Sess. Ch. 2.* That the King hath the only power of making War, and Peace. And that it shall be *Treason* for any number of men, less or more, upon any ground or pretext whatsoever, to rise, or continue in Arms, to maintain any Forts, Strengths, or Garisons, or to make Leagues or Treaties amongst themselves, or with foreign Princes, without his Majesties authority and approbation first interponed thereto: or to attempt any of these things under the pain of *Treason*. From which Act it is observable, 1. That the Authority of the three Estates is not able to defend the rising in Arms, or making Leagues, seeing that is declared to be his Majesties prerogative. 2. That the rising in defensive Arms is *Treason* by these words: *upon what pretext soever.* 3. That *nudus conatus* is in this case *Treason* by these words, *to attempt* By the *English* Law the conspiring to raise a War is not *Treason*, except it be *de facto* raised; and with them, if three or four rise to throw down private Houses, or for any private cause, it is but a *Ryot*; but if these three or four rise to reform Laws, or Religion, or upon any publick account; then it is accounted the *Levying War* against the King, *Cook hoc tit. pag. 9.* who likewise tells us, that if three conspire to *Levy* a War, it is *Treason*, if in the meer conspirers if the rest thereafter *Levied* actually a War, though he was not present; and in that sense only I would interpret the severe *l. 19. Basil. b. 1. propter cogitationem dignus est pena* *δια τὴν σκεψιν ἀξίος ἐστὶν ἀποκτείναι.* And the *English* Law requires still *ouvert fait*, an open deed. This rising in Arms is likewise called *seditio regni vel exercitus.* *Reg. Majest. lib. 4. cap. 1. & cap. 11. ibid. ad tit. sedit.*

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The second species of Treason, is to commit Treason against the King's Person; and I find that this is the first kind of Treason exprest in the former Act 25. Parl. 6. Ja. 2. whereby it is declared Treason to lay hands upon his person violently, what ever age he be of. Which words were added to clear that it was Treason to rebell even against his authority before he was Proclaimed, or Crowned. For the being Crowned or Proclaimed, is *tantum declaratoria juris, sed nihil novi juris tribuit*, it being the *jus sanguinis*, and succession of blood which makes him King. This species of Treason is likewise declared, Act. 3. and 4. Parl. 1. Ja. 1. and in thir cases *affectus sine effectu puniuntur* and thus the Master of *Forbes* was hurled through the Calfey, hanged and quartered, for imagining ( this is an *English* term which signifies a design ) to shoot K. James the 5th. 17. July 1537. And the Countess of *Glames* was burnt for imagining to poyson the said King James the fifth, 17. July 1537. By the Law of *England*, it is not Treason to kill a King out of possession, *Cook*, pag. 9. But this seems unjust, if the Kings title be clear, as our Kings was in exile. Though in dubious cases, such as betwixt the *Bruce* and *Baliol*, possession may difference the case. To kill the Kings eldest Son, is with them Treason, 25. Stat. Edw. 3.

The third species of Treason is, the resetting any who hath committed Treason, or that supplies them in redde, helpe or counsel, *cujus opera dolo malo hostes populi Romani pecunia aliave re adjuti erant*: This is likewise discharged Act. 67. Parl. 7. Ja. 5. Where all the Leidges are forbidden to reset, supplie, or maintain our Sovereign Lords Rebels, under pain of death: and if any disobey, to inforce ( *idest*, to second the King ) against notour rebels, against his person, when they be required and commanded, they shall be punished by the King as favourers of such Rebels, except they have for them a reasonable excusation, Act. 4. Parl. 1. Ja. 1. From which Act it may be debated the refusing to assist against rebels that are not notour, or against Rebels that have not committed any other Treason than Perduellion, cannot infer with us the guilt of Treason. The Doctors here debate, whether a Wife resetting her own Husband, or a Father his Son, commits Treason. And albeit it may be alledged, that the relation of Sovereign and Subject, is the chiefest of all others and so all other relations should cede to it; and Rebellion against the State looses all Relations. *l. post liminium. ff. de capt. & post limin*: Yet the ordinary distinction is, that if any of these Relations assist a Rebel with things that are necessary for him as a man, as Meat, Drink, &c. In that case they are not guilty of Treason; But if they assist these Relations with any thing that may be serviceable to them in their Treason, then they are guilty, *Farin. quest. 113. num. 280*. And *Mathens hoc tit. cap. 2. num. 20*. For albeit Rebels lose all the priviledge of the Municipal Law, yet they retain those priviledges that flow from the Law of Nations, and Nature, *Bartol. ad l. amissum, ff. de capt. & postlim*. And thus *Cesar* pardoned *Pompey's* Sons, and *Tiberius Piso's* Son, albeit they followed their Fathers after they were declared Traitors. But I find in our Law many Decisions of this question, as in July 1537. where *Janet Douglas* Lady *Glames* is convict and burnt, for fortifying and assisting the Earl of *Angus* and *George Douglas* her Brethren, Traitors and Rebels. And 18 July 1537. the Mr. of *Glames* is hang'd and drawn for concealing, and not revealing the treasonable Design of his Mother to poyson the King: But the Countess of *Errol* being pursued for assisting the Earl of *Bothwell*, at least for not revealing a Letter she had received from the Earl of *Bothwell's* Lady, desiring Assistance: It was alledged for the Lady, that the Countess of *Bothwell* was no Rebel, though her Husband was, and that she had not consented, this was delay'd, Anno 1596.

VII. The fourth Species or point of Treason is, to stuff the Houses of them who are are convict of Treason, and holds them against the King, or that stuffs any of their own Houses in furthering of the Kings Rebels, which is expressed also by the former Act : Yet I think this rather exgetick of the former point, than a separate point of Treason ; for both these may be comprehended under help *redde* or counsel. *Robert Stewart* was hang'd for keeping out his House against the King : and the Earl of *Orkney* his Father was hang'd for hounding out his Son ; the one the 5. of January, and the other the 1. of February, 1615. And *Cunninghame of Tourlands* was Forfault and Execute for Assisting his Brother in keeping out the House of *Cunningham-head*, 15. February, 1601. But yet when Houses are ordained to be rendered (being kept only for privat causes) under pain of Treason, though the Party disobey, yet if he thereafter yield, that manner of keeping out Houses will not be punished as Treason, but Arbitrarily, as in *Burgies* case, 1668.

The 2. of February, 1674. *Macklond of Assint* was Pannel'd for having Garrison'd his House of *Arbreak*, and convocating his *Majesties* Liedges, to the number of 400. men, under Pay and Collours. Against which it was alledg'd, that *Assint* here only fortified his House, and convocat his men to oppose the Earl of *Seaforth*, but not the King : Nor did he pretend any quarrel against the Government, but against privat Oppressions. To which it was answered, that this was expressly Treason by the 6. Parl. K. Ja. 2. cap. 14. whereby it is Statute, that none rebel against the King's Person or Authority : And the House being here Garrison'd to defend against the Sheriff, who was coming to eject in his *Majesties* Name : To resist him, was to resist his *Majesties* Authority, and being Garrison'd in furtherance of Rebels and Rebellion, it was Treason by the 25. Act 6. Parl. K. Ja. 2. Likeas the Convocation being of about 400. men, or thereby, under the command of Captains, Ensigns, and other Officers. It was likewise Treason by the 75. Act. 9. Parl. Q. M. and the 5. Act 1. Parl. Ch. 2. The Justices did find the Garrisoning of the House not relevant to infer Treason, but only to infer the punishment of De-forcement, whereupon the Pursuers were forced to alledge of new, that they insisted against him for having Garrison'd his House after the publication of the Letters of Fire and Sword raised at the Pursuers instance against *Assint*, upon which Debate they found, that the Garrisoning and Providing of the House after the publication of the Letters of Fire and Sword, was relevant to infer the punishment of Treason. Likeas they refused to sustain that Article wherein was Libel'd the raising of Men, and the disposing them in Companies under Collours, to be relevant, except it were alledg'd that they were an hundred men or upwards, and were under Collours, or Muster'd, or under weekly or daily Pay. And that all this was done after the publication of the Letters of Fire and Sword : both which Interloquitors seem'd surprizing. For as to the first, it seem'd that the Garrisoning of any House against a Sheriff, or any Judge, is to Garrison it against the King's Authority ; for a Sheriff doth represent the King in his Authority as much as any Souldier doth. And it is undeniable, that to Garrison Houses against the King's Souldiers, is Treason. Nor can it be denied, but that if this were allowed, no Sentence could receive Execution in *Scotland*, since every man might Garrison his House, and every man might deny that he Garrisoned his House against the King. And to put in a Garrison, and Authorize them to defend the House, was so clearly a War-like Action, that there was no place left to debate upon Intentions. And though the defending Houses be ordinarily pursued as De-forcement, yet the formal Garrisoning of it imports much more. And the Commission of Fire and Sword did not add any thing to the Crime committed, in Garrisoning the House : For the design of such Letters, is only to warrand the

the Liedges to prosecute them as Rebels ; So that before the raising of the Letters they were accounted open and notorious Rebels, for Letters of Fire and Sword are only granted against such ; and therefore *Assint* in Garrisoning his House to defend such, did expressly commit Treason against the 25. *Act*. 6. *Parl.* *Ja*. 2.

The second part of the Interloquutor seem'd likewise very hard ; for raising men in fear of War, and Lifting them under Colours, or Swearing them to Colours, is certainly *exercitum comparare*, though there were no Commission of Fire or Sword ; for the design of these Letters is not to make a Traitor, but to prosecute actual Rebels. And though this Army was not Levied to oppose immediatly the King's Government, yet even to raise an Army within the Kingdom, though no design could be proved, was Treason, for that was to usurp the King's Power : But much more was this Criminal, when the Levy was made, upon the wicked design of opposing the execution of the King's Laws, to see which executed was the chief part of his Kingly Government. And it is clear by the foresaid 17 *Act* 6. *Parl.* *Ja*. 2. that it is Treason to make War against the King's Liedges against his forbidding, and if any do, the King is to *gang upon them*, with assistance of the hail Lands, and to punish them after the quality of their trespass.

VIII. The fifth point of Treason is to assail Castles, or places where the King resides, or is for the time, *ibid*. But this must be only understood to be Treason, if the assaulter know the King to be there, or if he be not, upon design to rescue him, *quo casu*, he must be warranted by the Estates, as said is.

IX. The sixth point of Treason is, to raise a Fray in the King's Host or Army willfully, *Ja*. 2. *Parl.* 12 *Act* 54. upon which *Act* the Mr. of *Forbes* was hanged for raising Sedition in the King's Host at *Jedburgh*, 14. *July*, 1537.

X. The seventh point of Treason is, to trouble any who kills a declared Traitor, which *Act* extends only to the Kin, Friends, Fortifiers and Maintainers of these who are killed as Traitors ; because it is presumable that when these who are so related trouble the killer, it is presumable the trouble arises upon that account. 2. These relations are discharged to bear the killers any grudge, or injure them by Word or Writ. *Nota*, It appears that the reason of this grudge needs not be proved, but is presumed Presumption, *juris & de jure*, for here *lex præsunit & disponit super præsumpto*.

XI. The eighth point of Treason is, to impugn the Dignity and Authority of the three Estates : or to seek and procure the Innovation and Diminution of their Power or Authority, *Act* 130. *Parl.* 8. *Ja*. 6. But this is to be understood of a direct Impugning of their Authority, as if one contended that Parliaments were not necessary, or that one of the three Estates may be turned out.

XII. The ninth point of Treason is, to decline the King's Authority, or the Authority of his Council in any case, whether Spiritual or Temporal. And the King's Council are declared to be Judges competent to all Causes whatsoever, whether Spiritual or Temporal, or what ever Degree or Function the Defenders who are summoned shall be, *Act* 129. *Parl.* 8. *K.* *Ja*. 6. which *Act* was made to repress the Insolencies of the Ministry, who about that time used constantly to decline the King's Authority in Ecclesiastick matters. Conform to which *Act* Mr. *Andrew Crichtoun* was Sentenced to be hanged, and detain'd as Traitor, *Septemb.* 1610. And Mr. *James Guthrie* was execute in *Anno* 1661. for declining the King and his Councils Jurisdiction at *Striviling*, when he was challenged for some Words spoken in the Pulpit. From this *Act* it may be observed, that the King is in his own Person Judge competent over all Causes, and all Persons, even though the Pursuit be at his own instance,



which will appear both from the Rubrick and Statutory part of the Act, albeit *regulariter* no man can be Judge in his own Cause.

XIII. The tenth point of Treason is, to conceal and not reveal Treason : But concealing in this case is not Treason, except the concealer could have proved it ; for else he had by revealing and not proving made himself guilty of Treason. This concealing of Treason is by the *English* Law called misprision of Treason, and is punish'd only by Imprisonment during Life, Forfeiting of Goods, and of the profit of Lands during life. For this Crime the Earl of *Mortown* was execute by King *James* 6. for having conceal'd the design'd death of King *Henry* his Father : And it may be doubted whether concealing be Treason, where the King is not in a condition to repress or punish the Treason that is intended, for there the end of revealing seems to cease, which is Information in order to Resistance. It hath been likewise doubted, whether the not revealing Treason was punishable where the Treason was design'd by the Prince or Queen : But since they are likewise Subjects, and may commit Treason, therefore there can be no doubt but it is Treason in any others to conceal their treasonable designs.

XIV. The eleventh point of Treason is, to flee from his *Majesty* or his Lieutenant, which is not extended only to such as are sworn to Collours, but even to such as are warned to, and do attend the King's Host, *vid. viz. the Jurisdiction over Souldiers.*

XV. The twelfth point of Treason is, to deny his *Majesties* having the only Power of Calling and Dissolving of Parliaments, *Act* 3. *Parl.* 1. *Ch* 2.

XVI. By the common Law it is Treason to kill any of the Princes Counsellors, because they are a part of the Princes own Body, *C. quisquis c. h. t.* But with us the pursuing or invading any of the Session, Secret Council, or any of his *Majesties* Officers for doing his *Majesties* Service, is only punishable by Death, but not as Treason, *Act* 4. *Parl.* 16. *Ja.* 6. By Officers here are meant only Officers of State, else it might be extended to Messengers. And I heard it resolved that this Act extended not to such as invaded the Lyon. And these words, *Any of the Session*, are not extended to Advocats, Clerks, Macers, or any else besides the Lords, as is clear by the narrative of the Act. But I think the quality adjected that they were invaded for doing his *Majesties* Service, may be proved by Circumstances and Presumptions, as if a Pursuer who had lost a Cause, should invade the next day a Lord who had voted against him. And the words, *This being verified and tryed*, import so much. But the *Stat. Edward* 3. is much more clear, making it Treason to kill the Officers therein mentioned only, *viz.* Chancellor, Thesaurer, Chief Justice of either Bench, or any Judge of either Bench sitting in Judgment only ; and from this Statute of our Neighbouring Nation, we may argue that the killing none below a Lord of Session should inter the punishment of this Act. The killing a Member of Parliament is not in *England* Treason, though the Parliament be a higher Judicatory than any exprest in the Act. And *Cook* tells us that they allow not *argumentum à fortiori* to infer Crimes. And with us the killing a Member of Parliament would not infer Death by this Act, since they fall under no qualification therein specified. In *England*, *Killing Officers* falls only under the Statute, but with us, *Invading or Pursuing them* is Death, though it take no effect. *Quæritur*, If to invade them when they are out of the Kingdom would fall under the Statute, since they are not under that Character elsewhere. Or if he who invaded them during their being suspended, would fall under this Act, since during that time they retained the Character, and the Exercise is only suspended. And it is resolved by the Doctors that a Statute punishing such as invade Magistrats, is only to be extended to such Magistrats as are once admitted, but not to such as are only named or elected ; for such Statutes are extended

extended *in gratiosis*, yet they are restricted in such odious points as this, *Cabal cas. 148.*

*Treasonable Words, Vid. Tit. Injuries and Labels.*

XVII. The third branch of the division is Statutory Treason, which comprehends under it several other points of Treason, which because they relate to other Crimes, therefore I shall also refer the Reader to these Titles wherein these Crimes are principally treated of. But it will appear by these Acts, that these Crimes are not declared to be Treason, but only to be punishable as Treason, and therefore these Statutory Treasons have not at all the other privileges competent to Treason, as that they may be proved by Women, & *alias testes inhabiles*, or that he who accuses in these will commit Treason, if he prove not his Accusation. Thus wilful Fire raising is Treason, *Ja. 5. Parl. 3. cap. ultimo.* Theft in Landed men is Treason, *Ja. 6. Parl. 11. cap. 50. vid. tit.* Theft, Murder under trust is treason, *Ja. 6. Parl. 11. cap. 51. vid. tit.* Murder, slayers of Mals, Jesuits, trafficking Papists and their resettlers, commit Treason, *Ja. 6. Parl. 12. cap. 120. vid. tit. Heresie.* To buy or bring home poyson, is treason, *Ja. 2. Parl. 7. c. 31. vid. Poyson.* Thieves who take leill men upon Bond to re-enter them, commit treason, *Ja. 6. Parl. 1. cap. 21.* But though this Act speaks generally of the taking of any *Scotish-man*, yet it may clearly appear by the narrative, and the whole strain of the Act, that the same strikes only against such Thieves as keep correspondence with the *English*, and took *Scotish-men* prisoners into *England*. But custom hath interpret this otherwise, for *Duncan Macgrigor* was 15. July, 1643. convict and hang'd as a traitor, for arte and part of taking *James Anderson* and *John Mackie*, and the taking of *Captain Cairns* found relevant as an Article of treason against *Affant*.

To usurp any Prelats place after his decease, is likewise treason, *Ja. 5. Parl. 7. cap. 125.*

XVIII. This Crime hath in it many specialities, wherein it differs from other Crimes: As first, He who accuses any man for treason, doth incur the pain of treason, if the defenders be acquit, which is occasioned (as the Act bears) because of the odiousness of treason. But since the Act sayes expressly that this shall take place where *the party calumniat is called, accused, and quit of the Crime of Treason*; therefore it may be inferred, that though the pursuer raise Summonds of treason, and should pass from the same before the Pannel go to the knowledge of an Inquest, that *eo casu*, though the pursuer might be punished *pena extraordinaria*, yet he could not be punished as a traitor. It may be likewise doubted, if this holds in Statutory Treason, as Theft in Land-men, &c. And since the reason inductive of that Act is the odiousness of treason, it would appear that this rigid Law should not take place in these points of treason, which are not so odious of their own nature.

Another speciality in Treason is, that it can only be tryed by the Justices, *Reg. Maj. lib. 1. c. 1. v. 1.* and that because of the Kings immediat interest, since it is not presumable that the Fiscal in Inferiour Courts would be as careful as his *Majesties* Advocat, who cannot appear there, and because of the intricacies and great consequence of that Crime: but it may be doubted whether Lords of Regality, or Subjects having a Justiciary, are Judges competent to Treason and it seems not, for the reasons foresaid.

XIX. The second Priviledge of Treason is, that those who are pursued for Treason should be immediatly committed to Prison, and their Goods should be put under sicker Burrows, *id est* Caution, under which they must remain ay and while they suffer an Assize, *Ja. 2. p. 12. c. 49.* and *Reg. Maj. lib. 4. c. 1.* But it seems very hard in our Law, that there is no time prescribed for the Pursuer to insist, but that the person suspect may be kept in Prison for a

long time, though he be very innocent, and offer himself to a Tryal; whereby the most innocent of Subjects may be ruined in their Fortunes and Families, without any just cause. And yet upon the other hand, it were hard that Traitors should be allow'd to go abroad, because Probation cannot be presently had, which it may be the Traitor hath abstracted; or that the King or State should be forc'd to discover too soon by a pursuit, a Treason, which he is bound in policy to cover for some time. And as in War, so in Treason (which is as dangerous) many things are allowed to be done which are not otherwise regular, the interest of all preponderating the interest of any one or, a few.

XX. The third speciality in Treason, is, that all Charges of Treason should be execute by Heraulds and Pursevants, bearing Coats of Arms, and by Maces, and that for the greater solemnity, else these Charges are declared null, *Ja. 6. p. 12. c. 125.* Likeas, the ordinary custome is to execute Summonds of Treason after that manner. But it was found upon the 5, of December 1666. in the Action intented at his Majesties Advocats instance against Mackulloch and others, that this Act did only relate to Summonds of Treason, or any other Charges, wherein men are ordain'd to obey, under pain of Treason. But that indite-ments of Treason given to men who are in prison, may be execute by ordinary Messengers: And yet the Act sayes, that all executions given otherwise than is appointed by that Act, shall be null.

XXI. Women, and others, may be Witnesses in this Crime, though in other Crimes they cannot: and one Witness is sufficient here, and *famosi & impuberes* of what ever age, are receivable as Witnesses, by an exprels Act of the *Sederunt* of the Lords of Session, in Anno 1591. Likeas, *Cod. fab. hoc tit. def. 4.* sayes, *est privilegium criminis Lesa Majestatis ut facilius probetur.* And that it may be proved *per famosos & socios criminis.* And that it was decided in Savoy, 1591. *vid. Pappon. lib. 24. tit. 2.* But the English do most justly conclude, that because the punishment is severe in Treason, therefore it ought to be proved by manifest and direct proof, and not by presumptions, or strains of wit, *Cook pag. 12.* And that two witnesses are necessary for proving Treason; he proves most learnedly, *pag. 26.*

By the Civil Law, *famosi & mulieres* were admitted to accuse in this Crime, though not in any other Crime, *l. 7. and 8. ff. ad l. jul. maj.* But this last privilege should only hold in Perduellion, *Mascard. de prob. lib. 1. conclu. 462.* and not in Statutory Treason. And that this should hold in no species of Treason, was *Math. opinion, p. 372.* because *per l. ult. cod. de prob. in capitalibus causis Idonius testibus atque apertissimis documentis opus est dicitur nec excipitur crimen Majestatis.* Neither doth it follow, that because persons who are not admitted in other Crimes, are admitted to be accusers in this, that therefore these who are unfit to be Witnesses in other Crimes, should be admitted in this: for there is little hazard in an unfit accuser, but there is great hazard in unfit Witnesses. And this I think much more suitable to reason then the former Statute; for the greater the hazard is, the probation should be so much the clearer. And though *testes inhabiles* may be received, or one Witness may prove sufficiently for subjecting the Pannel to the torture, (which is all that can be inferred from that Act of *Sederunt*, which says only that they ought to be received Witnesses, but says not, that they ought to be received in all cases) Yet it were against all reason that any condemnatory Verdict or Sentence could be founded upon such Probation.

I find also by the Law of Savoy, that *socii criminis, & famosi*, are admitted to be Witnesses; not in Treason generally, but in Perduellion. And that Act is by their Lawyers restricted so, that the Pannel cannot be condemned to Death or Forfeiture upon such Depositions, but only to torture: Nor will he be tortured upon such Depositions, except the Deponent be upon Oath, and



and abide the Torture also at his Deposition, *Cod. fab. lib. 9. tit. 5.* All which seems most reasonable, but yet it seems that no man is to be reputed *socius criminis*, but he who is convict, or hath confessed the Crime, and dilates others; for else a man being accused for Treason, cannot alledge that the Witnesses led against him were *socii criminis*, for that were to confess himself to be guilty: for no man can be *socius criminis* to the Pannel, except the Pannel be guilty himself, and was *socius* to the Witnesses therein *nam relatus se mutuo punit*. And this was so found in *Affant's* Process, but it was there alledged, that though *socius criminis* could not be received for the Pannel, yet he could be received against him: And that was the sense of the Doctors, who exclude *socius criminis* from being a Witness in Treason. But as to this, I doubt very much, for if a person confessed his Accession, it seems unjust that he could condemn others, being infamous himself. And yet in open Treasons, as rising in Arms, it seems necessary to receive such as were in Arms: for none else can come near an Army of Rebels, and so the Crime must be proved by these, or by none.

XXII. The fifth Priviledge is, that Treason is not extinguish'd by death in all cases, as other Crimes are. But that Treason committed against the Kings Person, or Common-wealth, may be inquired into after death, and the Committers Heir may be forefault therefore, *Ja. 5. p. 6. c. 69.* which Act bearing to be founded upon the Civil Law; these general words contained in it, *against the Kings Person or Common-wealth*, must only be extended against such Treasons, as were by the Civil Law accounted Perduellion: And therefore it is most necessary to know the Civil Law in this case, and what was therein called Perduellion. Seing albeit all Treasons may by a natural Interpretation be said to be committed against the Kings Person, or Common-wealth, yet the Civil Law declared only that Species of the Crime of Treason, which they called Perduellion to be punishable after death, *l. ult. ff. ad l. Jul. Maj: plane non quisquis legis Juliae Majestatis reus, est in eadem conditione: Sed qui Perduellionis reus est, hostili animo adversus rem-publicam, vel principem animatus.* So that the infallible Mark of Perduellion is *hostilis animus*, a design of raising Arms. And therefore we may conclude that not only Statutory Treasons are extinguished by death, but that even simple concealing, and not revealing, or a malicious design to poyson the King, and such other Treasons as shew not a desire of rising in Arms, are likewise extinguished by death. And yet the *Basil. l. 12. h. t.* say, that all the heads of Treason are extinguish'd by Death, *excepto capite proditoris, & insidiarum contra principem*, *χωρις το capi καθυσταται απο τα κεφαλα της προδοσιας; & της κατα βασιλεως ενισχυα.*

Albeit the Bones of the Defunct Traitor are ordinarily taken up, and brought to the Pannel in pursuits of this nature, as was done in the Forfaulture of the Laird of *Restalrig*; yet this is not necessary, but it is necessary in pursuits of this nature, that the Defuncts nearest of Kin be called, as Defenders, for their interest; both because their Estates are to be taken from them by their Forfaulture, and to the end they may defend the Defunct, and object both against the relevancy of the Libel, and the hability of the Witnesses: and therefore the *Basilick* add very well, that *hereditas publicatur, nisi crimen ab hereditibus purgetur*, *αδ μη καθαρωθη απο των κληρονομων.*

It may be doubted, whether since the forefaulting after death, is founded upon the Civil Law, and that the former Act bears expressly, that these pursuits may be interted conform to the Common-Law, if these pursuits should not prescribe with us in five years, as they do by the common Law: and it would appear they should, since these pursuits are intended conform to the common-Law, and *quem sequitur commodam eum debet sequi incommodam.*

The sixth Priviledge of Treason is, that the Kings Advocat is to be the last Speaker to the Affize in Perduellion, though in other cases the Pannel's Advocats are to be last Speakers; And the last Speaker has much Advantage, for he may answer all is alledged by the opponent, *Art. 11. Regulations 1670.*

XXIII. The last Priviledge of Treason is, that albeit of old no persons could be condemned in absence by the Justices; yet the Parliament still could have proceeded against Traitors in absence. And now by a late Act of Parliament, it is found, that in the case of Perduellion, and of treasonable rising in Arms against the Kings Authority, the Justices may proceed to the receiving of Probation, and pronouncing of Sentence even in absence of the Party: Which being first propounded as a Querie to the Council, they remitted the same to the Session, to whom his *Majesties* Advocat gave in the following Reasons, and Queries, upon the 15. *August 1667.* Whether or not a person guilty of High Treason may be pursued before the Justices, albeit they be absent and contumacious? So that the Justice upon Citation, and sufficient Probation and Evidence, may pronounce Sentence and Doom of Forefaulture, if the Dittay be proved. The reason of Scruple is, that Processes of forefaulture are not so frequent; and that in other ordinary Crimes, the Defenders, if they do not appear, are declared Fugitives, and that the following Reasons appears to be strong and relevant for the Affirmative, 1. By the common Law, albeit a Party absent cannot be condemned for a Crime, yet in Treason which is *crimen exceptum*: This is a Speciality, that absents may be proceeded against, and sentenced. 2. By the first Act of King *James* the 5th, his 6 Parliament, it is declared, that the King hath good Cause and Action to pursue all Summonds of Treason committed against his Person and common-wealth, conform to the common Law, and good Equity and Reason, notwithstanding there be no special Law, Act, or Provision made thereupon. And therefore seing by the common Law, persons guilty of Lese Majesty may be proceeded against, and sentenc'd, though they be absent. It appears that there is the same reason why the Justices should proceed against, and sentence persons guilty of Treason, though absent, and that he is sufficiently warranted by the said Act so to do. 3. It is inconsistent with Law, Equity and Reason, that a person guilty of Treason should be in a better case, and his *Majesty* in a worse, by the contumacy of a Traitor, the same being an addition (if any can be added) to so high a Crime; and that he should have impunity, and his *Majesty* prejudged of the Casualty arising to him by his Forefaulture. 4. The Parliament is in use to proceed and pronounce Doom of Forefaulture, though the Party be absent: and in so doing they do not proceed in and by a legislative Power, but as the supreme Judges: And the Parliament being the Fountain of Justice, what is just before them, is just and warrantable before other Judicatories in the like cases. 5. By the above-mentioned Act of Parliament, it is Statute, that Summonds and Process of Treason may be intended and pursued after the Death of the Delinquents, either his Memory, or Estate, delating the one, and forefaulting the other, whereupon Sentence may follow to the effect foresaid. And therefore, seing Sentence may follow when the Delinquent cannot be present, and is not in Beeing, it were against all Reason, that when they are wilfully and contumaciously absent, they should not be proceeded against, and Sentenced, if they be guilty. And it were unjust that his Majesty should call a Parliament for punishing and Forefaulting of persons, being absent, or that he should wait till they die; especially seing in the *interim* the Probation may perish, by decease of the Witnesses.

Follows the Lords of Session their Opinion, *Edinburgh*, the 26 of *February*, 1667.

The Lords of Council and Session having considered the Queries above-written, presented to them by the Lord Bellenden his Majesties Thesaurer Deput, it was their opinion, that upon the Justices Citation, and sufficient Probation taken before them, the Judge and Assize may proceed and pronounce Sentence thereintil, and Forefaulture against the Persons guilty of high Treason, though they be absent and contumacious.

Sic subscribitur Jo. Gilmore. J. P. D.

Upon this the Parliament ratified the Processes led against these persons : and by the 11. Act. Parl. 2. Ch. 2. Sess. 1. It is Statuted, that rising in Arms against the Kings Authority, might be pursued before, and judged by the Justices. But the Parliament retains still a Power cumulative with the Justices ; and when Processes of Treason are intended before them, they may proceed as formerly, and thought this last Act a great innovation of all our Law. Nor is it imaginable but that if it had been safe, that that priviledge would had been granted to his Majesty formerly : And that it is contrary to the Civil Law, is clear, per l. 1. & l. penult. ff. de requirendis reis, nam annotabantur bona, & si reus post annum non comparuerit, & satis dederit de stando, non recuperabit bona, non tamen de delicto habetur pro confesso. Divi fratres rescripserunt, l. 1. ne quis absens puniatur, & hoc jure utimur, ne absens damnetur. And that no probation can be received against absents in Treason, is clear by Mathews hoc tit. and albeit per extrav. constitutionem Hen. 7. It is ordained, that probacion may be received in absence, yet this is reputed no part of the Civil Law, and is followed by no Nation, and by that extravagant constitution this priviledge is allowed to all species of Treason, which we find to be unjust. And albeit Treason may be in some cases punished after death, yet it cannot be from that inferred, that it may be punished in absence, since after death the malice of unjust pursuers ordinarily ceases, and the hazard of Death is then over : so that the event of the pursuit is not so terrible, nor dangerous. And in these processes, the nearest of Kin are called, who may propound against both relevancy and probation, whatever was competent to the Defunct. Whereas when a person is pursued in absence for Treason, no man can in our Law be admitted to propound any thing in his defence. And albeit it seem unreasonable that a person guilty of Treason should be in a better condition by his contumacy, then if he compeared. To this it may be answered, that this would prove too much, for this absurdity may be as well press'd in absents for all other Crimes, and against such as are absents in all the several inditements of Treason ; and yet the Justices are never allowed even by the late Act to proceed to sentence against any, but such as are pursued for rising in Arms against the King. But the true answer to this seeming absurdity, is, that the Law is not so inhumane, as to punish equally presum'd and real guilt : what may be a Crime, as what is found one. And it hath been oft found, that men have been absent, rather out of fear of a prevailing Faction, or corrupt Witnesses, or by inadvertence, or not being truly cited, or by being violently detained than out of a consciousness of guilt ; yet since so judicious a person proposed this overture, and since Council, Session, and Parliament have fortified it by their Authority, I submit my judgement to their determinations.

XXIV. It is ordinary for his Majesty, to command, or forbid, by privat warrands, under all highest pains, or as you shall be answerable to us. And the certification here being indefinit, it may be doubted what the punishment may be in case of contravention. And 1. It would appear that the contraveeners cannot be punished as guilty of Treason, for only Lawscan make Traitors in this Kingdom. 2. It seems that this being a contempt of the chief and Supreme Magistrat, it may be punish'd arbitrarily ; if the command be lawful, and in case of importance, since even inferiour Judges may punish such as con-



temn or disobey them, in what is necessary for their Jurisdiction. Likeas Lawyers are of opinion, that *in obediens praecepto superioris sub pena indignationis est arbitrarie puniendus*, Cabal. casu. 30. Bal. in l. legis virtus, ff. de legib. Menoch. cas. 365. But in that case, they determine that the arbitrary punishment cannot extend to death. And though some Doctors are of opinion that commissions are to be punish'd in this case more severely than omissions, yet I conceive some omissions may infer greater contempt, and be more dangerous than commissions. Nor allow I the distinction used by *Lucas de penna. ad l. 1. C. ut dignit. ord. servet.* who sayes, that if the contempt be of dangerous consequence, as if on being commanded to take care of a Castle, or to stop the passage of an enemy, that then the contempt is to be severely punish'd by death: but if the contempt be of things indifferent, or mean, then the contempt is only punishable arbitrarily. And yet he is too severe in making it to be punishable by death, except the person commanded were a Souldier, or one who were obliged by acceptance of his Office to obey under that peril. And therefore I would rather distinguish betwixt such commands as use to be punish'd by death, if contemn'd, such as Military commands; and in these, the contempt may be punish'd by death, for Custom comes in place of Law, & *sibi imputet*, who hath undertaken such an employment as requires such obedience. But if the King should command any Countrey Gentleman, or Lawyer; to fortifie, or keep a Castle under all highest pains, it is probable, that their omission could not be punished by death, and is only punishable by losing of the Princes favour, & *quod Princeps non exhibebit se gratiosum*: which *Bartol.* makes the punishment of that disobedience in all cases, *ad extra. qui sunt rebell.*

XXV. The punishment of Læse Majestie was death, l. 5. *C. h. t. anima commissio*, as *Justinian* calls it in his Institutions, together with the Confiscation of all his Estate that lyes within the Territories of him against whom the Treason is committed; but is not extended to his Estate lying else where, *C. 2. de constil. in 6.* So that if a man commit Treason against the King of Britain his Estates in *France* does not forfeit.

With us the punishment of Treason is death, and Confiscation likewise of all the Traitors Estate, whether Heretable, or Moveable, Feudal, or Allodial. And the solemnity used in Parliament at the pronouncing of such sentences are, that the Pannel receives his sentence kneeling, and that after the Doom of the forefaulture is pronounced against him, the Lyon & his Brethren Heralds come in in their formalities, and tear his Coat of Arms at the Throne, and thereafter hang up his Escutchion revers'd upon the Cross: Which had its rise from the old Roman customs, for as *Tacit.* observes, lib. 5. *deterre omnes a simili culpa volebant, non pœna modo, sed ignominia metu, ut nomen è fastis deleteretur, & effigies tolleretur* Which is likewise clear, l. 24. ff. de pœnis. And that this is the custom of *Flanders* is clear be *Perez. h. t. moribus nostris insignia gentilia delentur, & destrunntur.* But this I think should only hold in the Crime of Perduellion, but not in other Treasons. *Perez, ibid. num. 19.*

Another speciality introduced in the punishment of Perduellion, by the common Law, was, that *memoria damnabatur*, and that his Children were declared incapable to bruike any Estate or Office; which the Emperours *Arcadius* and *Honorius*, l. 5. c. ad l. *Jul. Maj.* calls a mitigation of the punishment due to Children, who as they say should have died for their Fathers Crime. But this is so unjust, that no Nation doth now use it, as *Mathews* observes, p. 352 And it is expressly against l. *Crimen ff. de pœnis*, and the Scripture, *Deut. Chap. 24. Vers. 16.* And the opinion of *Plato*, lib. 9. de legibus. And therefore *Amazias 2. King. 14. 5, 6.* would not kill such as were the Children of those who kill'd his Eather, because (as is exprest there) *The Father shall not*

be put to death for the Children, not the Children for the Father's. And Heben's punishment, *Joshua 7. 14.* wherein he and his sons and his daughters were stoned to death, and burned for his own Crime is no concluding argument against this opinion; since that was founded expressly upon Gods revealed will, who can dispence with, or alter the Laws of Nature: but it is very probable that the reason of that severe sentence was, that God knew the whole Family to be involved in the guilt. And it is very probable that they were refetters of the Theft, or conscious to it, since the stolen goods were taken out of the Tent where they were. And I remember that our Parliament in *Anno 1661.* having adjected to the Marquis of Argyles Sentence the dishabilitation of his Children, his Majesty did expressly command it to be rescinded in the last Session of that Parliament; in which the Children were rendered capable to bruike Estates or Honours, as the other Subjects were. I know it is the opinion of some Lawyers, such as *Budeus*, that this *l. 5.* was thereafter abrogat, *l. Sancimus C. de penis*, which by his calculation is two years after the other. And though *Matheus* thinks that *l. Sancimus* is only introduced in favours of the Friends, but not of the Children: Yet it is more just to think that by this Law the former was abrogat, even *quo ad Children*, since the reason given in that Law is general, *Sancimus ibi esse penam ubi & noxia est propinquos, notos, familiares procul à calumnia submovemus, quos reos sceleris societas non facit. Nec enim affinitas, vel amicitia nefarium crimen admittunt. Peccata igitur suos teneant auctores: nec ulterius progrediatur metus quam reperitur delictum. Hoc singulis quibusque iudicibus intimetur.* Nor can it be concluded, that it is clear that the former Law was not abrogat by that Law, since *l. pen. C. Theod. de bon. proscip.* the same Emperour *Honorius* leaves no estate to the Children of Traitors: for it does not follow, that because they are to succeed to no Estate of the Traitors, that therefore they should be incapable to gain, or to succeed to any other Estate. But after all these Laws the *Basil. l. 5. h. 1.* extends the punishment, *nota per A. S. S.*

Another Punishment of Perduellion by the Canon Law, *cap. felix de penis in 6.* is, that the Traitors House shal be thrown down, and not rebuilt, which is not in observance amongst us. Nor was it lawful to mourn for him when dead, or to give him a publick Burial, *l. 11. ff. de his qui not. & l. 35. ff. de relig.* And with us it is ordinary for the friends of such as are condemned for Treason, to get a warrant for attending them in mourning upon the Scaffold. But I do not find that the attending him in mourning, or the burying him, was ever accounted a Crime in Scotland.

I find that some Lawyers believe, that the fear of losing an Estate excuses him who has complied with the Enemies of his Prince, *nota ad Clar. h. 1. num. 9. Imol. Consil. 34.* But this was expressly repelled in the Marquis of Argyles Process 1661. But certainly the fear of Life might excuse; for there can be no Crime where there is not a voluntary Act, & nothing can be voluntar which is forced.

Though Repentance is no relevant Defence against a ditty of Treason, especially where there is once a deed of Treason committed; yet such is the clemency of Princes, that by the *l. 1. Basil. h. 11.* I find that he who in the beginning of a conspiracy reveals, is to be rewarded, but he who after the Treason is committed reveals the Authors, *para to πρῆμα*, is only to be pardoned.

Sometimes likewise to punish the atrociousness of this Crime, the very Parents are banished, and all the Family are ordained to change their name, as was done in *Ravillac's* case by the Parliament of Paris: for though these could not be corporally punished, yet the State may justly deny their protection, and Country, to any who may be presumed will bear Revenge, or probably were infected with their Friends Crime.

But though these punishments may be inflicted after probation, yet if the Pannel was only denounced for not appearing in Treason, he only loses his

Moveables; and gift of Forefaule following such a Denunciation was declared null by the Lords of Session, because the certification of the Letters in that case, is only to be denounced fugitives, and lose their Moveables, 30 July 1662. and 30 Novemb. 1671. *Haige contra Majorop.*

## TITLE VII.

### Sedition.

- 1 What is Sedition?
- 2 The punishment of it.
- 3 Convocation of the Liedges how punished.

I. **S**edition is a Commotion of the people without Authority, and if it be such as tends to the disturbing of the Government, *ad exitium Principis vel Senatorum ejus & mutationem rei publicæ*, it is Treason; but if it only be raised upon any private Account, it is not properly called Treason: But it is with us called a Convocation of the Liedges.

These publick Seditions are called *Seditio Regni vel exercitus*, cap. 1. l. 4. *Reg. Majest.* And this Species of Sedition is punishable as Treason: And the Mr. of Forber was hanged for raising Sedition in the Kings Host at Jedburgh. When a Sedition is raised against the Government, it is reputed Treason by the Doctors, as is clear by *Bossius de crimine læsæ Majestatis*: And *Peregrinus hoc tit.*

II. Albeit per l. 1. *cod. de Seditiosis*, it be only said, *Mulctam gravissimam subincabit*, which general Term, in my opinion, is used to signify that this Crime is not to be equally punished, but according to the several degrees of guilt, and the Authors and first raisers of the tumult are to be most severely punished. And the *Basilick* says only, that *gravissima pene subijcitur*, *κατά τὴν ἀρχὴν αὐταρχίας*, which the Greek gloss expounds unwarrantably to be *ultimum supplicium* in all cases, and as to raise men against the Prince is Treason, so to raise them against publick Order or Discipline, *κατὰ τὴν ἀρχὴν αὐταρχίας*, is Sedition properly, and thus Treason and Sedition properly differ, though oftentimes Sedition may be accompanied with Qualities which may raise it to Treason. And this the *Basilicks* make not *seditiosus conventus* Treason; but if it be raised *ut occidatur Magistratus seditiosus conventus*, it is Treason in that case, l. 1. b. 1.

I find not Sedition to be expressly declared Treason with us in any cases for by the 78 *Act Ja. 2. Parl. 14.* The raising of Commons in hindering the common Law (which is properly Sedition) or the making of Leagues and Bonds within Burgh, without the command of their Head-Officer, is declared to be punishable by Confiscation of Moveables, and that their Lives shall be in the King's Will. From which Act it is likewise to be observed, that the Command of the Magistrate doth in things belonging to his Office excuse the Liedges, and therefore it may be asserted that the Liedges rising in obedience to commands of the Sheriff, or Lord of Regality, are not punishable, except it was clearly palpable to them that their insurrection was in contempt of his Majesty's Authority, which appears to be the meaning of the forsaide l. *si quis contra evidentissimam jussionem*, &c. And seeing the Liedges are obliged to obey their Magistrates, and to rise when he calls them, as is evident by



by many Acts of Parliament, and without this allowance his Majesty could not be served: it were hard to punish them for that obedience, which would be punishable if they refused it.

III. The convocating the Liedges in Bands of Men of War, for daily, or monethly wages, without special licence, is declared likewise to be punishable by death, by the 75. *Act*. 9. *Parl.* 2. *M.* which *Act* is ratified by the 12. *Act* 10. *Parl.* K. Ja. 6. And the making of all Leagues and Bands amongst the Liedges without his Majesties consent, are discharged, and the contraveeners are declared to be punishable as movers of Sedition and unquietness, to the trouble of the publick peace of the Realm, therefore to be punished with all rigour, to the example of others. Both which Acts are ratified by the 4. *Act*. 1. *Ses.* *Charl.* 2. And yet it may be contended that such Seditions as these are punishable as Treason, since the making of Bonds and Leagues amongst the Liedges is declared by the foresaid 4. *Act* to be one of his Majesties Royal Prerogatives. And sure it is Treason for any of his Majesties Liedges to usurp his royal prerogative. But sure it is, that to convocat the Liedges simply without Bonds or Leagues, can no ways be accounted Treason, much less the being present at such Convocations, though in Arms: And thus it was found in the case of a Baxter who was pursued as guilty of the Convocation raised against the Customers in Anno 1665. That naked assistance at such meetings *per se* was not relevant to infer death, but only an arbitrary punishment, as is clear by the 5. *Act*. 1. *Parl.* Ja. 1. whereby all men are forbidden to travel with more nor they can sustain, and if they do, they may be put under sicker Burthens till the King declare his will. And by the 85. *Act* 6. *Parl.* J. 1. Electing of Deacons was discharged as sedition.

Convocations are allowed in some cases, as for pursuing of Thieves and Sornerers, as Ja. 6. *Parl.* 14. *cap.* 247.

This Crime of simple Convocation is ordinarily pursued before the Council, and is seldom punished either by the Council, or Justice Court, *tanquam crimen per se*, but as the aggravating quality of a Riot or other Crime.

## TITLE VIII.

### Poyson.

- 1 The punishment of Poyson by our Law.
- 2 How far the giving good Druggs irregularly is punishable.
- 3 Whether the poisoning Jews, or Excommunicat Persons, be punishable.
- 4 Whether the poisoning Beasts, or Fields, be punishable by this Statute.
- 5 Whether endeavours to poyson be punishable.
- 6 The aggravations of this Crime.

I. Poyson is by our Law declared to be punishable as the Crime of Treason, but it is not declared Treason, *Act*. 31. 7. *Parl.* Ja. 2. By which all persons are discharged to bring home Poyson for any use by which any Christian man or woman may take bodily harm, and that under the pain of Treason, and that being convict, they shall forfeit to the King Life, Land, and Goods; but notwithstanding of these words, for any manner or use, Apothecaries and others do daily bring home Poyson. But to this it may be answer'd, that they bring the same home, not as Poyson, but as Druggs, and the Law presumes that the Liedges are in no hazard of that Poyson which is in

the hands of skilful men. This was likewise the opinion of the Doctors *Gothofred prax. criminal. §. venenum*: But notwithstanding that the buying or giving of Poyson is declared Treason by the Law, yet I find no instances in the Journal Books where any have been convict as Traitors upon this account: But on the contrary, *John Dick* for poysoning his brother and Sister is only ordained to be execute, but is not forefault, *ult. Marsh 1649*. If any Stranger bring home Poyson any manner of way, it is provided by the 32. Act of that Parliament, that they shal be punished the same manner of way, and that no remission or safe conduct shal be profitable to them.

The reason of this severity proceeds from the abominableness of that Crime, *plus est enim hominem veneno necare quam gladio dicit gloss. in §. ead. lege inst. de publicis iudiciis per textum l. 1. de mal. & Math.* For he to whom Poyson is given cannot defend himself, and Poyson is a way of death so much hated, that though the Law hath allowed Executions by the Sword, yet it hath never allowed any Execution by Poyson.

Those who give Poyson were by the Civil Law called *venenarii*, and they were only punished capitally, *per l. Corneliam de scariis, l. 1. §. 1. ad l. Cornel. de sic.* And it may be proved by presumptions, *Clarus Quest. 4. vers. fin.* But the Body must in this case be sighted by Physicians, and the poysonous quality must be proved.

The Buying of Poyson, though with a design to kill thereby, if murder do not actually ensue, is not thought capital by the Doctors, but only punishable *Pena extraordinaria*, *Gothofred. prax. criminal. §. venenum unum. 21.* Yet with us the very buying is by this Act of Parliament capital.

II. Whether to give Druggs that are not of their own nature poysonable too frequently, and contrary to the nature of the Disease, be punishable by this Law, or as Murder, or be punishable at all, was debated in *Kennedies* case, the 8. of *February 1676.* and that it was punishable was contended, because *venenum* or *pharmacum* was in Law *nomen generis*, and exprest good Druggs as well as ill, *l. venenum ff. de verbo. sig.* And the best of Druggs, given in great excess, is Poyson; for Poyson consists in excess of quantity as well as quality, and whatever overpowers our nature is poysonable to us. And since the one may kill as well as the other, and that killing is that which is punish'd, the Law should punish the one as well as the other. And whatever may be said where the design was not known, yet here the design of killing was communicated to *Kennedie*. And it is proved that he refused to give meer Poyson, lest the external marks after death should discover that Poyson was given, but that it was safer to give constant purgations to be thrown in by his Servant in his drink upon all occasions, and that without his knowledge, and contrary to the nature of his disease, he having a Fluk: All which circumstances shew a design to kill. And *Gothofred. §. venenum* is clear that *medici & Pharmacopola ineptum medicamentum scienter adhibentes ut infirmus morietur tenentur ut homicida.* And though the judgement of Physicians ought to be ask'd where the design is not known, yet where the design of killing, and means suitable to that design are clearly proved, there is no place for consulting Physicians; nor can any danger ensue from the preparative of Purging this Panner to other Physicians or Apothecaries, except they give Physick without being employed by the party, and at the desire of Servants, who employ upon a design to kill, and administrat the Druggs at unreasonable hours: All which are of themselves Criminal; and this way is more dangerous than ordinary Poyson, because Servants are more easily admitted than others, and this way is less discoverable. Nor needs it be proved that the Defendant died of this Poyson, for even one who got true Poyson might have died of other diseases, but it is sufficiently proved, that after the giving of this Purgatives,

Purgatives, he died the next morning of such a looseness as made his Bed to swim. And as this is like the natural product, *to presumitur contra versantem in illicito*, especially all this design of Murder being to conceal the Servants theft, in which this Apothecary was a shater.

III. From these words of the Act, *through the which any Christian man or woman may take bodily harm*, it may be concluded, that 1. The poysoning of a Jew or Pagan falls not under this Act, though it may be pursued as Murder: And it may be doubted whether the poysoning of an Excommunicat person can fall under this Act, since they are not Christians: But to prevent all this, the *English Statute* bears, that to kill any reasonable creature *in rerum natura*, By Poyson, or otherwise, &c. And *Cook* observes, that to poyson a Jew or Turk falls under their Statute.

IV. From these words likewise it may be observed that the poysoning of bruit Beasts does not fall immediately under this Act, nor yet the poysoning whole Fields, to the end Beasts may die. Albeit both these Crimes be punishable by death by the Laws of other Nations, as *Carpz.* observes, *Tract. crim. Quest. 21. num. 24.* And since Theft is punishable by death, much more ought the poysoning of Beasts be, since not only is the party les'd by wanting his Beasts as much as in Theft, but the Common-wealth is more prejudg'd than in Theft, since the Beasts so poyson'd, are made unserviceable as to all uses; and men are likewise in danger by eating or using of them; And this is worse than houghing of Oxen, which is capital by our Law.

But if a beast be poyson'd, that men may be thereby poyson'd, then the poysoning of Beasts will infer death.

From these words, *may take bodily harm*, it may be infer'd likewise that the giving of Poyson whereby men do fall Paralytick, or Lame, should fall under this Statute, though the person dies not, since that may be constructed bodily harm.

V. As also it may be concluded, that since to bring home Poyson whereby men may die does infer death, that therefore the giving of Poyson, though death do not follow, either because the Poyson was not strong enough, or because the party poisoned did counter-act its force immediately by suitable remedies, should be punishable by death; for these are more immediat deeds than to bring home Poyson: And generally indeavour is in this Crime punish'd as the consummat Act, where the indeavour comes to any deed that approaches the Crime, *l. 1. ff. ad. l. Pomp. de parricid.* though *Carpz.* is of a contrair opinion, asserting that *conatus* or indeavour is only to be punished even in that case by an extraordinary punishment. The administrating Drinks or Medicaments to procure or increase love, is thought not punishable, though death do not follow, because there was no design there to kill, *Carpz. ibid. & l. signis ff. de penis.* though this be punishable, as that Law asserts, by a lesser punishment, *nam est res mali exempli.*

VI. Indeavour is punishable in the poysoning of Parents, and in reiterated indeavours, though death follow not. And the poysoning of Magistrates, or Masters, since these great aggravations are so odious in the very contrivance, that these aggravations are as odious as success: And as the Judge may mitigate the punishment upon the account of lessening circumstances, so he may lighten the punishment upon the account of aggravating circumstances, *Vasq. contraver. illust. cap. 14.* and *Carpz. num. 50. quest. 20. part. 1.* gives us several Decisions to this purpose, and amongst other decisions, tells us of two Mountebanks who were burnt with hot Tongs to death, for having poyson'd ten several persons. But if a Physician would poyson his Patient, it would be certainly Treason withus, as being Murder under trust.



## TITLE IX.

### *De Incendiariis, or Fire-raisers.*

- 1 *Malicious and designed Fire-raising is only punishable by death.*
- 2 *What presumptions can prove this design.*
- 3 *Whether one may be punished for burning his own house?*
- 4 *The punishment of Fire-raising according to the Civil Law.*
- 5 *The punishment of it according to our Law.*
- 6 *The burning of Coal-heughs how punished.*
- 7 *Whether the drowning a Coal-heugh be punishable, as the burning of it.*
- 8 *Fire-raising cannot be remitted.*
- 9 *The punishment culpæ incendii.*
- 10 *How accidental Fire-raising is to be punished.*
- 11 *How Masters are to be punished for their Servants negligence.*

**I**T is most unnatural that the Elements which were created to be Servants to Man, should have dominion over him: And therefore these who raise Fire are reputed great enemies to Mankind, and more Criminal than either Thieves or Murderers. For in Theft, the thing stolen remains still with the Commonwealth, whereas it is absolutely destroyed by Fire: And in Murder the Crime extends never further than the design, whereas in Fire-raising, the merciless Element which is employed, deborders off beyond its Commission, and involves in the common Misery those against whom the Fire-raiser had no design, with those who were his known Enemies. And therefore those who raise Fire within a Town are burnt; whereas those who burn only a House are not so grievously punished.

I. A Fire-raiser, or *Incendarius*, is by Lawyers defined to be he who of design raiseth Fire, whether he kindle the same with his own hand, or commissionat another, or executes himself another's Commission. And because of the atrociousness of this Crime, the attempt is punished, though the effect follow not, and threatnings, though nothing follow, are punished, *Damhaud. rubrica de Incendiariis*, but because this Crime is of so high a nature, and that it is improbable that any would be so merciless to commit the same, therefore the Law requires that the Fire-raising which is punishable, be committed *dolo malo*: And with us it is required they be *combustores domorum nequiter & malitiose*, as *Skeen* translates it, *ad cap. 10. Malcolmii 2.* And wilful Fire-raising is only declared punishable by death, *Cap. 8. Parl. 3. Ja. 5.*

II. But since design and *dolus* are acts of the Mind, therefore they are infer'd from Presumptions, and what Presumptions are necessary in this case, are very well related by *Far. quest. 110. cap. 2.* And *John Meldrum* was executed upon Presumptions, 2 Aug. 1633, where he being pursued for burning the House of *Frendrick*: The only Presumptions adduced against him were, great Threatnings, capital Enmity, his contradicting himself in his own Examinations, common Brute and open Fame, that he was the Burner. But I think that case very hard, and not to be drawn in consequence, for though the *dolus* and design may be proved by Presumptions, because that is an act of the Mind, yet the Burning it self being an external Act, should only be proved by Witnesses & Confession. Seing *probatio presumptiva* is but *fictitia*, it were hard to allow both the burning it self, and *quo animo* the Fire was raised to be proved by Presumptions

sumptions against that common rule in Law, that *dua sibi non videtur in eandem rem*. 3. Lawyers are positive, that *dolus debet possit probari manifeste*, *Bertex. consil. 322*.

III. It is doubted among the Doctors, whether he that burns his own House may be punished as *Incendarius*, since *quilibet est rei suae arbiter*; and Dominion is defined to be the using of any thing as we think fit. But since Fire-raising is oft-times punished, not only for the prejudice it hath done, *sed quia flamma potuit longius evagari*, therefore Fire-raising should be punished in this case. And as it is not presumable that any man will burn his own without design, so if this were not punished, men might upon the pretext of burning their own, waste and destroy their own, and ruine their Neighbours. And he might very well be presumed to have had a design against his Neighbours; but though the immediat Dominion belong to privat persons, yet the King has also an Interest, & *dominium directum*. And as no man can kill himself lawfully, so neither can he burn his own House, except he can instruct that he did the same upon a just and reasonable cause.

IV. The punishment of Fire-raising by the Civil Law, was various, and suitable to the several degrees of the Crime; for raisers of Fire within a Town were burnt alive: Those who burn Corns beside Houses were Bound and Beat, and then Burnt, but not Burnt quick, as we speak, *lex 28. par. Incendarii ff. de penis*, but the burning of a House or Village was not so highly punished. And *Clarus Quest. 68*. thinks that the Statutory pain of Fire-raising, if it be capital, should not take place in small Fire-raising: But since a small Spark may kindle a great Fire, this conclusion seems very unwarrantable, if the Fire was designedly rais'd.

V. According to our Law, the burning of Folks in their Houses, and Corns, and wilful Fire-raising, is Treason: And Last Majesty, *Ja. 5. p. 3. cap. 8*. From which Act it is to be observed, 1. That the Particle *and*, is not here copulative, but a disjunctive, for either of these cases, *viz.* the burning of Corns is *per se* Treason. 2. It is observable, that all Fire-raising is not Treason, (though the Rubrick of the Act bear, that all Fire-raising is Treason,) which may be concluded by these Reasons, 1. That all Punishments should be commensurat to the Delicts and Crimes which are punished; and therefore since Fire-raising is very various, it were unjust that they should be all equally punished, especially the Punishment here being Treason, which were too severe for burning Peets in a Moss, or a little Cottage standing in a Moor, where the guilt is so small, that the Offenders in these cases should be capitally punished. And in a case pursued against *Markenise of Suddie*, upon the 29. July 1663. for burning some Fewel standing upon a Moor, the Justices would not sustain this as Treason. 2. If all Fire-raising were by this Act Treason, there needed not a posterior Act have been made, *cap. 146. p. 12. Ja. 6.* declaring that wilful Fire-raising in Coal-heughs, upon Malice and Despite, is punishable as Treason. 3. By the foresaid Act of *K. Ja. 5.* it needed not to have been said that the burning of Folks in their Houses, and the burning of Houses and Corns should be Treason, if generally all Fire-raising were Treason.

For the better understanding then of that Act, we must consider that there are three several species of Fire-raising declared to be Treason by that Act: The first is, the burning of Folks in their Houses, which must be interpret likewise to be the burning of Dwelling-houses, though the People were not accidentally there, or were possibly there, & escaped Which species of Fire-raising is most severely punished, both because Fire-raising was of all others the most horrid, & *domus sua est unicuique tutissimum refugium*, and because ordinarily the burning of all the persons dwelling in the House is thereby designed, as well as the burning the House it self.

The second species is, the burning Houses and Corns, which is suitable to the foresaid 28. Law ff. *de penis*, where it is said, that *qui acervum frumenti juxta adespositum combusserit, vincens, verberatusque, igne necatur*.

The third species is, willful Fire-raising, which differs in this from Burning, that Burning is of a particular place, with design to destroy no more : But Fire-raising is the burning a particular place, with design to burn more ; as to kindle a little Corn upon design to burn the whole Field.

VI. The other Act making the burning of Coal-heughs to be Treason, was practised upon John Henry, 14. June 1615. who was hang'd thereupon. And the reason of this Law was founded upon the favourableness of that Manufactory, which some do ruine by putting fire in them, which is so easie, that nothing could defend against it, but the severity of such a Law as this, and upon the greatness of the hazard which did arise by such Fires as this, which could never be quenched when once kindled.

VII. I was once consulted whether the drowning of Coal-heughs was Treason by this Act, since *erat eadem ratio utrobique*, but I thought not, because penal Laws, especially in which the punishment is so severe as Treason, should not be extended, as is elsewhere largely debated. and the hazard of drowning a Coal-heugh is not equal to the burning of it, for drowning can be easier removed, and cannot spread so far.

VIII. So odious is this Crime, that it is expressly provided it shall be one of the four points of the Crown, and so can only be cognosced by the Justices; and all remissions granted for Fire raising are declared null : But this last is not in *viridi observantia*. And Fire-raising being included in the Earl of Caithness's remission, it was sustained, though thir Acts were objected.

IX. If *dolo* and design cannot be proved in the Fire-raising, so that it were accidental, *sed si culpa incendio causam dederit*, there is a Civil Action, by the Civil Law allow'd, *ex lege aquilia* : But for the further understanding *incendii culpas*, the more exact Doctors do distinguish betwixt *incendium ex culpa lata, ex culpa levi, & ex culpa levissima commissum*. And since *culpa lata aequiparatur dolo*, therefore they may make it to be corporally punishable, though in that case the punishment is not extended to death; but if the same be committed only *ex culpa levi*, then it is to be punished by a Fine : but if the committer have not wherewith to pay his Fine, he may Subsidiarily be punished in his person : But if the Fire be raised *per culpam levissimam*, then the committer can never be punished corporally, even though he want Money wherewith to pay his Fine, *dicunt tamen aliqui culpam levissimam in faciendo, aequiparari culpa levi in committendo*. Alex. con. 55.

IX. By our Law, he who burns a House in a Town by misgovernance and not of set purpose, as the Act sayes, he shall be punished at the sight of the Magistrats in the Town, & his Goods, shall be given to him who suffers the prejudice, and shall likewise be banished for three years; and if he have no Goods, he shall be scourged at the Mercat Cross, and thorow the Town, and shall be banished for seven years; but if he, who owes the House, do either by himself, his Wife or Bairns, (*id est* negligently) burn his own House, albeit no Neighbour be thereby prejudged, yet he shall be banished the Town for three years : And if he to whom the House is set burn the same negligently, he shall repair the damage, and be banished for three years : or if a Stranger, or Traveler, burn, as said is, he shall be Arrested, and repair the skaith, which if he be not able to do, he shall abide in Sickness (*id est*, in Prison) at the King's will : And if the Governours of the Town be negligent in the Execution of their Office, they are to be unawed in ten pounds : And if Fire happens in Husband Towns, in Baronies, they are to be punish'd by the Lords, *id est*, Barons in like manner as Magistrats do within Burgh, Ja. 1. Parl. 4. cap. 75.

By



By this Act likewise, no Fire is to be carried from one House to another, but in a covered Vessel, under the pain of an Un-law ; but since this Un-law is not exprest, it is therefore Arbitrary to the Judge to raise it as high as his Jurisdiction will suffer, though in justice he should proportion it to the Crime, especially since it is not tax'd here of design, that it may be proportioned, as said is.

Upon this Act there may be several doubts raised, as first, What is meant by the word *misgovernance*, for clearing whereof, the common distinction made by the Doctors, and related by *Alexander Consilio 55.* would be considered. And it appears that misgovernance in this case does include *culpam levissimam*, the meanest fault, because the Act bears *misgovernance*, and not of set purpose; so that whatever is not of set purpose, or designed, is punishable by this Act, Likeas, the word *recklessly*, which is likewise used in this Act, as exegetick of the former, may be properly enough extended to *culpa levissima*; but yet it may be argued upon the other hand, that since the punishment of Servants raising Fire by misgovernance, is to be Scourged publickly, and then Banished, and that Masters are punished if they burn their own Houses, after that manner, it were hard to extend this punishment *ad culpam levissimam*: and as the Law interprets obligations to give Wine or Corn, neither to be extended to the best, nor worst of that species; so in this case, misgovernance should be interpret, as that it may properly neither be meant of *culpa lata*, nor *levissima*, but of *culpa levis*, which is *media*: and the word misgovernance properly doth imply a fault that is considerable, & *verba penam imponientia, sunt strictissime interpretanda*, as Lawyers observe. 2. It may be doubted, whether if Children who are not come to that age at which they are only punishable themselves, should burn the Fathers House, if the Father be punishable by this Act, *eo casu*; and albeit it would seem that he is, seeing accident without Judgement is punished in this case, by repairing the damage done, yet it is more suitable to reason to conclude that he is not, because 1. He who hath no government by Law of himself, or any thing else, cannot be said to do any thing by misgovernance. 2. Children in Law are *equiparati* to furious persons, or Idiots; and as the Father could not be punishable for what is done by his Children, being furious, and Idiots, so neither can he be punishable for what is done by them whilst they are *impuberes*. 3. *Quia accessorium sequitur naturam sui principalis, & subsidium naturam ejus cui est subsidium*, and therefore, where the Child himself cannot be punished, we ought to conclude that the Father ought not to be punished for him.

XI. The Doctors do conclude that the Master of the Family is bound not only for his own, but likewise for the fault of any of the Family who raiseth Fire, for having choos'd them himself, he ought to be lyable for their fault, & he ought to blame himself for not choosing of better Servants. But this is to be restricted to the injuries done by the Servants in their respective employments to which they were made overseers by Masters: As for instance, if the Cook should leave the Fire securely at night in the Kitchen, but a Laquie belonging to the House should thereafter come in to the Kitchen and scatter it so as that both their Masters and the Neighbours House were burnt, they conclude that the Master would not be lyable to make up his Neighbours damage since the Master was not to be blamed, the person choos'd by be him having done his duty, *Carpz. part. 1. quest. 39. num. 51. & 52.* But this seems unreasonable. for it may be alledged that the Master should not have choosen any such Servants: And it is all one to the Neighbours, by whom the prejudice is done or whether it was done without the committers office, or not. And therefore it were fit to consider whether the person who did the injury was known to be a profligate or vicious person before he was employed. And it seems

that this may be the interest of the common-wealth, because it would secure Neighbours, and be advantagious for the common-wealth, that none should imploy Servants who are not sufficient.

## TITLE X. Witch-craft.

- 1 *Wierus arguments against the punishing of Witches, with the Answers thereto.*
- 2 *Some Observations which may perswade a Judge to be cautious in judging this Crime.*
- 3 *Upon what presumptions Witches may be apprehended.*
- 4 *Who are Judges competent thereto.*
- 5 *Paction with the Devil.*
- 6 *Renouncing of Baptism.*
- 7 *The Devils Mark.*
- 8 *Threatning to do mischief; how punishable.*
- 9 *Malefices where there are no connection betwixt the Cause and the Effect.*
- 10 *The using Magick Arts for good ends, how punishable.*
- 11 *Consulting with Witches how punished.*
- 12 *What the being defamed by the Witches imports.*
- 13 *A Witches Confession not punishable, except the thing confest be possible, and de succubis & incubis.*
- 14 *Whether the Transportations confest, be real, and though real, whether punishable.*
- 15 *Whether a Witch can cause any person to be possesst.*
- 16 *Whether penetration be possible.*
- 17 *Whether Transformation be possible.*
- 18 *Whether he can make Bruits to speak, or raise Storms.*
- 19 *Whether Witches may transfer Diseases, and whether it be lawful to seek their help for this.*
- 20 *Whether Witches may Kill by their looks.*
- 21 *Whether they can procure love by their Potions.*
- 22 *How they torment Men by their Images.*
- 23 *Whether Confessions before Kirk Sessions be relevant.*
- 24 *Who can be Witnesses in this Crime.*
- 25 *The punishment of this Crime by the Civil Law, and ours.*
- 26 *The punishment of it by the Law of England.*

**T**Hat there are Witches, Divines cannot doubt, since the Word of God hath ordain'd that no Witch shall live; nor Lawyers in *Scotland*, seeing our Law ordains it to be punished with death. And though many Lawyers in *Holland*, and else where, do think, that albeit there were Witches under the Law, yet there are none under the Gospel; the Devils power having ceased, as to these, as well as in his giving Responses by Oracles.

1. *Wierus*, that great Patron of Witch craft, endeavours to maintain his opinion by these Arguments; 1. That such as are accused of Witch-craft are ordinarily silly old Women, whose age and Sex disposeth them to Melancholy, and whose Melancholy disposeth them to a madness, which should render their Confessions very suspect: And in this Crime there are seldom other proofs; whereas the things confest are so horrid, that it cannot be imagined any reasonable creature would commit them. 2. God can only work the Miracle ascribed

scribed to Witches; he who is the Author of Nature being only able to alter or divert its course. And the Devil doth but delude the fancy of poor Creatures, as Feavers and Melancholy misrepresent objects: Nor are such as are cheated in the one more guilty than they who are sick of the other. And it is severe to burn men and women for doing that which is concluded impossible to be done by them. 3. It is unjust to punish them for doing ill by Charms, except it could be first proved that these Charms produc'd the effects that are punishable; and Lawyers should argue thus, those who kill or hurt Men or Beasts by unlawful means, are punishable by death. But so it is, that Witches and Charmers kill men and Beasts by unlawful means, and therefore Charmers ought to be punished by death. Of which Syllogism *Wierns* denies the Minor; for it can never be proved that Verses, Crosses, or laying Flesh in the Threshold, &c. can destroy Men or Beasts, these being causes very disproportionable to such effects, there Being no Contract betwixt the Agent and Patient in these cases. 4. These who execute the will of God are not punishable, for that is their duty, and so cannot be their Crime. But so it is, that whatever the Devil or Witches do, is decreed by God either for tryal or punishment expressly, and without his permission nothing can be done. And if the Devil were not acting here by obedience, or were at liberty, he would not leave any one man undestroyed, or any of Gods works undefaced.

But that there are Witches, and that they are punishable capitally, not only when they Poyson or Murder, but even for Enchanting and deluding the world, is clear by an express Text, *Exod. 22. Verse 18. Thou shalt not suffer a Witch to live*: And it is observable, that the same word which expresses a Witch here, is that which is used in *Exod. 7.* to express those Magicians who deluded only the people by transforming a Rod into a Serpent, as *Moses* had done, though no person was prejudged by their cheat and illusion. Likeas, *Lev. 29. and 27.* It is ordained that a man or Woman that hath a familiar spirit, or that is a Wizard, shall surely be put to death; they shall stone them with stones; their blood shall be upon them. Which Laws were in such observation amongst the Jews, that the Witch of *Endor*, *1 Sam. 28.* was afraid to use her Sorcerie before the King, because the King had cut off those who had Familiar Spirits and Wizards out of the Land. And so great indignation did the eternal God bear to this sin, that he did destroy the Ten Tribes of Israel because they were addicted to it.

Nor were the Jews only enemies to this vice, but even the Heathens following the Dictates of Nature, punished Witches as enemies to the Author of it; for the Persians dashed their heads against Stones, as *Minsing* observes, ad §. Item *lex Cornelia inst. de pub. jud.* and *Tacitus lib. 2. Annal.* tells us, that *Publius Marcius* and *Pitvanus* were executed for this Crime: for which likewise *Valerius Maximus, lib. 6. cap. 3.* tells us, that *Publicia* and *Lucinia* were with threescore and ten other Romans hang'd. But since it is expressly condemned in Scripture, and by many general Councils, such as *Aurelian*, *Toletan*, and *Anaciritan*, it should not be lawful for us to debate what the Law hath expressly condemned, by the same reason, that we should deny Witches, we must deny the truth of all History, Ecclesiastick and Secular: And *Plutarch, lib. 5. Sumpf. cap. 7.* observes. *Quodammodo Philosophiam tollunt, qui rebus mirabilibus fidem non habent oportet, autem qua ratione aliquid fiat, ratione tractare, quod vero id fiat, ex ratione est sumendum.* It is sure that the Devil having the power and will to prejudice men, cannot but be ready to execute all that is in Witch-craft: And it is as credible that God would suffer men to be convinc'd by this means, that there are Spirits, and that by thir means he would give continued proofs of his power in repressing the Devil, and of the necessity that silly men have of depending upon his infinit power.



To the former Arguments it may be answered, that as to the first, all sins and vices are the effects of delusion; nor are Witches more deluded by Melancholy, than Murderers are by rage or Revenge. And though it hath never been seen that persons naturally mad, have been either guilty of, or punished for this Crime, the Devil designing in this Crime to gain only such as can damn themselves by giving a free consent. Yet if Madness could be proved, or did appear; it would certainly defend both against the guilt and punishment: And therefore such a series of clear circumstances should concur before a person be found guilty of this Crime, as should be able to secure the Pannel, and satisfy the Judge fully in the Quærie. But since daily experience convinces the world that there may be such a Crime, and that the Law exacts either confession, or clear proofs, who can condemn the Law as rigorous in this case since without believing these there could be no Justice administrat, and whilst Judges shun'd to punish it in some cases, they behoved to suffer it from the same arguments to go unpunished in all cases.

To the second, it is answerd, that though neither the Devil nor Witches can work miracles, yet the offering to cheat the world by a commerce with the Devil, and the very believing that the Devil is able to do such things for them, should be a sufficient Crime; but much more when they believe all those things to be done by themselves, they giving their own express consent to the Crime and concurring by all that in them is to the commission of it. Likeas, it is undeniable that the Devil knowing all the secrets of Nature, may by applying Actives to Passives. that are unknown to us, produce real effects which seem impossible.

To the third, though Charms be not able to produce the effects that are punishable in Witches, yet since these effects cannot be produced without the Devil, and that he will not imploy himself at the desire of any who have not resigned themselves wholly to him, it is very just that the users of these should be punished, being guilty at least of Apostasie and Heresie.

The fourth Argument is but a meer and silly Sophism, for though God in his providence permits at least all things that are done, to be done, yet such as contemn either the commands of him or his Vicegerents ought to be punish'd.

I cannot but acknowledge that there are some secrets in Nature which would have been lookt upon in the first Authors as the effects of Magick: And I believe that in the duller Nations a Philosopher drawing Iron with a Loadstone might have run a great risque of being burnt; and it is hard to give a judgement of *Naudens* learned Book in favours of the *Persian* Magicians, the *Assyrian Chaldeans*, the *Indian* Gymnosophists, and the *Druids* of the *Gauls*; for it cannot be denied but that many true Mathematicians and Physicians have past for Magicians in the duller ages of the world, but as to this, there is now no fear since Learning hath sufficiently illuminat the world, so as to distinguish betwixt these two. But I am still jealous of those Sages who were frequented by Familiar Spirits, though they were otherwise very excellent men, such as *Porphir*, *Jamblicus*, *Plotin*, and others, who pretended by the purity of their lives to be so spiritual, as to deserve the friendship of Spirits: For besides that the Primitive Fathers and Doctors of the Church have testified against such, as meer Magicians. It is not intelligible how those Spirits which frequented them could be good, since they were tempted to fall from the true Religion to Paganism, and did offer such Sacrifices as the true God did never allow; and if such impostures were allowed, it were easie for any to defend themselves, being truly Witches.

II. Albeit Witch-craft be the greatest of Crimes, since it includes in it the grossest of Heresies, and Blasphemies, and Treasons against God, in preferring to the Almighty his rebel and enemy, and in thinking the Devil worthier of be-

being served and revered, and is accompanied with Murder, Poysoning, Bestiality, and other horrid Crimes. Yet I conclude only from this, that when Witches are found guilty, they shall be most severely punished, not with Scourging and Banishment, as the custom of *Savoy* was related to be by *Gothofred, hoc tit.* but by the most ignominious of deaths. Yet from the horridness of this Crime, I do conclude, that of all Crimes it requires the clearest relevancy, and most convincing probation. And I condemn next to the Witches themselves, those cruel and too forward Judges, who burn persons by thousands as guilty of this Crime, to whom I shall recommend these considerations.

I, That it is not presumeable that any who hear of the kindness of God to men, and of the Devils malice against them; of the rewards of Heaven, and torments of Hell, would deliberately enter into the service of that wicked Spirit, whom they know to have no riches to bestow, nor power to help, except it be allowed by permission, that he may tempt men: And that he being a liar from the beginning, his promise deserves no belief, especially since in no mans experience he hath ever advantag'd any person: whereas on the contrary, his service hath brought all who entered in it to the Stake.

II, Those poor persons who are ordinarily accused of this Crime are poor ignorant Creatures, and oft-times Women who understand not the nature of what they are accused of; and many mistake their own fears and apprehensions for Witch-craft; of which I shall give you two instances, one of a poor Weaver, who after he had confessed Witch-craft, being asked how he saw the Devil, he answered, *Like Flies dancing about the Candle.* Another of a Woman, who asked seriously, when she was accused, if a Woman might be a Witch and not know it? And it is dangerous that these who are of all others the most simple, should be tryed for a Crime, which of all others is most mysterious.

III. These poor creatures when they are defamed, become so confounded with fear, and the close Prison in which they are kept, and so starved for want of meat and sleep, (either of which wants is enough to disorder the strongest reason) that hardly wiser and most serious people then they would escape distraction, And when men are confounded with fear and apprehension, they will imagine things very ridiculous and absurd, and as no man would escape a profound melancholy upon such an occasion, and amidst such usages; therefore I remit to Physicians and others to consider what may be the effects of melancholy, which hath oft made men, who appeared otherwise solid enough, imagine they were Horses, or had lost their Noses, &c. And since it may make men erre in things which are obvious to their senses, vvhhat may be expected as to things vvhich transcends the vviseft mens reason.

IV. Most of these poor creatures are tortured by their keepers, vvho being persvaded they do God good service, think it their duty to vex and torment poor Prisoners, And I know *ex certissima scientia*, that most of all that ever vvere taken, vvere tormented after this manner, and this usage vvvas the ground of all their confession: and albeit the poor miscreants cannot prove this usage, the actors being the only vvitnesses, yet the Judge should be affraid of it, as that vvvhich as first did elicit the confession, and for fear of vvvhich they dare not retract it.

V. I went when I was a Justice-Deput to examine some Women, who had confest judicially, and one of them, who was a silly Creature, told me under Secresie, that she had not confest because she was Guilty, but being a poor Creature, who wrought for her Meat, and being defam'd for a Witch she knew she would Starve, for no person thereafter would either give her Meat or Lodging, and that all men would Beat her, and hound Dogs at her, and that therefore she desired to be out of the World; whereupon she wept

most bitterly, and upon her Knees call'd God to witness to what she said. Another told me that she was afraid the Devil would challenge a right to her, after she was said to be his Servant, and would haunt her, as the Minister said when he was desiring her to confess; and therefore she desired to die. And really Ministers are oft-times indiscreet in their Zeal, to have poor Creatures to confess in this: And I recommend to Judges, that the wisest Ministers should be sent to them, and those who are sent, should be cautious in this.

6. Many of them confess things which all Divines conclude impossible, as transmutation of their Bodies into Beasts, and Money into Stones, and their going through Walls and close Doors, and a thousand other ridiculous things, which have no truth nor existence but in their Fancy.

7. The Accusers here are Masters, or Neighbours who had their Children dead, and are engaged by Grief to suspect these poor Creatures. I knew one likewise burnt because the Lady was jealous of her with her Husband: And the Crime is so odious, that they are never assisted or defended by their Relations.

8. The Witnesses and Affizers are afraid, that if they escape that they will die for it, and therefore they take an unwarrantable latitude. And I have observed, that scarce ever any who were accused before a Country Assize of Neighbours, did escape that Tryal.

9. Commissions are granted ordinarily to Gentlemen, and others in the Country, who are suspect upon this account: and who are not exactly enough acquaint with the nature of this Crime, which is so debateable amongst the most learned: Nor have the Pannels any to plead for them, & to take notice who are led as Witnesses; so that many are admitted who are *testes inhabiles*, and suspect: And albeit their Confessions are sent to, and advised by the Council before such Commissions be granted, yet the Council cannot know how these Confessions were emitted, nor all the circumstances which are necessary and cannot be known at a distance. Very many of these poor silly Women do refile at the Stake from the Confessions they emitted at the Bar, and yet have died very penitent: And as it is presumeable that few will accuse themselves, or confess against their own life, yet very many confess this Crime.

\*III. The method I shall use in treating of this Crime shall be, 1. Upon what suspicion Witches may be apprehended. 2. What Judges are competent. 3. What Ditties are relevant. 4. What Probation is sufficient. 5. What is the ordinary Punishment. As to the first, I know it is ordinary in Scotland not only that Magistrats do apprehend Witches almost upon any dilation, but even Gentlemen, and such as are Masters of the Ground, do likewise make them Prisoners, and keep them so till they transmit them at their pleasure to Justices of Peace, Magistrats, or to some open Prisons. But all this procedure is most unwarrantable, for Gentlemen, and such as are vested with no Authority, should upon no account (without a special Warrant) apprehend any upon suspicion that they are Witches, since to apprehend is an Act of Jurisdiction; and therefore I think no Prison should receive any as suspect of Witch-craft, until they know that the person offered to them be apprehended by lawful Authority. 2. Since Imprisonment is a Punishment, and constantly attended with much Infamy to the Name, and detriment to the Affairs of him who is imprisoned, especially in Witch-craft: I do conclude that there must some Presumption precede all Inquisition. For the meanest degrees of Inquisition, though without captour, does somewhat defame. And that the person should not be apprehended except it appear by the event of the Inquisition, that she lyes under either many or pregnant Suspicions; such as that she is defamed by other Witches; that she hath been her self of an evil Fame; that she hath been found Charming, or that the ordinary Instruments of Charming be found in



in her House. And according to *Delrio's* opinion, *lib. 5. §. 2. ad assumendas informationes, sufficient levia judicia, sed gravia requiruntur ad hoc ut cite-tur reus, & ut judex specialiter inquirat.*

IV. Witch-craft was *crimen utriusque fori*, by the Canon Law: and with us the Kirk-Sessions use to inquire into it, in order to the Scandal; and to take the Confession of the Parties, to receive Witnesses against them; as is clear by the Process of *Janet Barker* and *Margaret Lawder*, Decemb. 9. 1643. But since so much weight is laid upon the Depositions there emitted, Kirk-Sessions should be very cautious in their procedures.

By the Act of Parliament Q. M. 9. Parl. 73. *Act.* All Sheriffs, Lords of Regalities, and their Deputs, and all other Judges having power to execute the same, are ordained to execute that Act against Witch-craft; which can import no more, but that they should concur to the Punishment of the Crime, by apprehending, or imprisoning the Party suspect: But it doth not follow, that because they may concur, that therefore they are Judges competent to the cognition of the Crime; since the relevancy in it is oft-times so intricat, and the procedure requires necessarily so much arbitrariness, and the Punishment is so severe, that these Considerations joynly should appropriat the cognition thereof solely to the Justice Court. Nor find I any instances wherein these Inferior Courts have tryed this Crime. And albeit the Council do oft-times grant Commissions to Country-men, yet that seems dangerous; nor can I see why by expresse Act of Parliament it should have been appointed, that no Commission should be granted for trying Murder, and yet Witch-craft should be so tryed by Commissions. The Justices then are the proper Judges in Witch-craft.

V. As to the relevancy in this Crime, the first Article useth to be *paction* to serve the Devil, which is certainly relevant, *per se*, without any addition, as is to be seen in all the Inditements, especially in that of *Margaret Hutchison*, August 10. 1661. And by *Delrio*, *Carpz. p. 1. quest. 49.* and others; but because the Devil useth to appear in the similitude of a Man, when he desireth these poor Creatures to serve him; therefore they should be Interrogat, if they knew him to be the Devil when they condescended to his Service.

Paction with the Devil is divided by Lawyers, in *expressum*, & *tacitum*, an expresse and tacit Paction. Expresse Paction is performed either by a formal Promise given to the Devil then present, or by presenting a Supplication to him, or by giving the promise to a Proxie or Commissioner impowered by the Devil for that effect, which is used by some who dare not see himself. The Formula set down by *Delrio*, is, *I deny God Creator of Heaven and Earth, and I adhere to thee, and believe in thee.* But by the Journal Books it appears, that the ordinary Form of expresse Paction confest by our Witness, is a simple Promise to serve him. Tacit Paction is either when a person who hath made no expresse Paction, useth the Words or Signs which Sorcerers use, knowing them to be such, either by their Books, or Discourse; and this is condemned as Sorcery, *Can. 26. quest. 5.* and is relevant to infer the Crime of Witch-craft, or to use these Words and Signs, though the user know them not to be such; and this is no Crime, if the Ignorance be probable, and if the user be content to abstain, *Delrio, lib. 2. quest. 4.*

VI. Renouncing of Baptism is by *Delrio* made an effect of Paction, yet with us it is *per se* relevant, as was found in the former Process of *Margaret Hutchison*: and the Solemnity confest by our Witches, is the putting one hand to the crown of the Head, and another to the sole of the Foot, renouncing their Baptism in that posture. *Delrio* tells us, that the Devil useth to Baptize them of new, and to wipe off their Brow the old Baptism: And our Witches confest always the giving them

them new Names, which are very ridiculous, as *Red-banks, Serjeant, &c.*

VII. The Devils Mark useth to be a great Article with us, but it is not *per se* found relevant, except it be confest by them, that they got that Mark with their own consent; *quo casu*, it is equivalent to a Passion. This Mark is given them, as is alledg'd, by a Nip in any part of the Body, and it is blew: *Delrio* calls it *Stigma*, or Character, *lib. 2. quest. 4.* and alledges that it is sometimes like the Impression of a Hares foot, or the Foot of a Rat, or Spider, *l. 5. §. 4. num. 28.* Some think that it is impossible there can be any Mark which is insensible, and will not bleed; for all things that live must have Blood, and so this place behov'd both to be dead and alive at once, and behov'd to live without aliment; for Blood is the Aliment of the Body: But it is very easie to conceive that the Devil may make a place insensible at a time, or may apply things that may squeez out the Blood.

This Mark is discovered amongst us by a Pricker, whose Trade it is, and who learns it as other Trades; but this is a horrid Cheat: for they alledge that if the place bleed not, or if the person be not sensible, he or she is infallibly a Witch. But as *Delrio* confesses, it is very hard to know any such Mark, *à novo, clavo, vel impetigine naturali*, and there are many pieces of dead flesh which are insensible, even in living Bodies: And a Villain who used this Trade with us, being in the year 1666. apprehended for other Villanies, did confest all this Trade to be a meer Cheat.

VIII. Threatning to do mischief, if any evil follow immediatly, hath been too ordinarily found a relevant Article to infer Witch-craft with us. Thus *Agnes Finnie* was pursued in anno 1643. upon the general Article of having witch'd several persons; and particularly for these Articles, 1. That *William Fairlie* having Nick-named and called her *Annie Winnie*, she swore in rage he should go halting home, and within 24 hours he took a Palsie. 2. That *Beatrice Nisbet* refusing to pay the said *Agnes* the Annualrent of two Dollars owing by *Hector Nisbet* her Father, she told her she should repent it, and within an hour thereafter she lost her Tongue, and the power of her right Side. 3. That *Janet Greintoun* having refused to carry away two Herrings she had bought from the said *Agnes*, and to pay for them, she told her it should be the last Meat she should eat, and within a little after she fell Sick: Against which Articles it was there Alledged that this Libel was not relevant, & could not go to the knowledge of an Inquest: Because no means were condescended upon from which the Witch-craft was inferred: And if this Libel were relevant it would be relevant to libel generally that the Pannel were a Witch. 2. Affizers are only Judges to the matter of Fact, and not to what consists *in jure*. But so it is, that if this Libel were to pass to the knowledge of an Inquest, all the debate *in jure* behoved to be before the Assize before whom the Pannels Procurators behoved to debate how far *mine & damnum sequuntur* are relevant, and how far any person is punishable as a Witch, though no Charms or other Means commonly used by Witches be condescended upon; and as to the Threatnings, they were not relevant, seeing they had not all the Requisits which are exprest by the Doctors as Requisite, for they were not specifick, bearing the Promise to do a particular ill, as that *Fairlie* should take a Palsie, or *Nisbet* lose her Tongue. 2. There was not a preceeding Reason of Enmity proved, nor is it probable that for so small a matter as a Herring, or the Annualrent of two Dollars, she would have killed any person, and exposed her self to hazard; nor was the effect immediat, nor such as could not have proceeded from any other natural Cause, without all vvhich had concurr'd. *Delrio lib. 5. §. 3.* is very clear, that *mine etiam cum damno sequuntur*, are not so much as a Presumption: but though all these did concur, it is very clear, both from *Delrio ibid.* and *Farin. quest. 5. num. 37.* That all these Threatnings are not sufficient to infer the

the Crime of Witch-craft. Lastly, it was offered to be proved, that some of these persons died of a natural Disease, depending upon Causes preceeding that threatening: Notwithstanding of all which, the Libell was found relevant, and the was burnt. But I think this Decision very hard, and very contrary to the Opinion of all received Writers, who think, that albeit *mina* be *adminiculata* with all the former Advantages, & *probata de ea qua solet minus exequi*, yet the same are only sufficient to infer an arbitrary Punishment, not Corporal, but Pecuniary; and certainly such a wicked custom as Threatning, is in it self a Crime: And thus it was only well found to be *crimen in suo genere*, in the Process led against *Katherin Oswald*, Novemb. 11. 1629.

IX. Sometimes Articles are Libel'd, wherein the Malefice hath no dependence at all upon the Means used: And thus it was Libel'd against *Margaret Hutchison*, August 20. 1661. That *John Clarke* Wife being sick, she came to the Bed-side when all the Doors and Windows were fast, and comb'd her Head several Nights; and the last of these Nights she came to the Bed side, and put her Hand to the Womans Pape, whereupon the Child died, which Article was found relevant *per se*. And it was Libel'd against *James Cock*, September 7. 1661. that a Woman called *Spindie* being at Enmity with her, she gave her a cuff, whereupon *Spindie* immediatly distracted; and being reproved therefore by the Minister of *Dalkeith*, he immediatly distracted; which Article was likewise found relevant, being joyned with Fame and Dilation: Which Decisions are in my Opinion very dangerous, for they want a sure Foundation, and are Precedents whereby Judges may become very arbitrary. And against these I may oppose a third Allegiance used in the former Process against *Agnes Finnie*, wherein it was alledged, that the conclusion of all Criminal Libels should be necessarily inferred from the Deed subsumed, and that *conclusio semper sequitur debiliorem partem: nam libellus est syllogismus apodicticus; sed non probabilis*; and therefore except the Libel could condescend upon some means used by the Pannel, from which the Malefice were necessarily infer'd, it could not be concluded that these Malefices were done by her, or that she was guilty of the wrong done. Thus *Bodin lib. 4.* does conclude, that *venefica non sunt condemnanda licet sint deprehensa cum bosonibus, offibus, aliisque instrumentis egredientis ex ovili licet oves immediate moriantur*. And *Perkins cap. 6.* asserts, that neither Defamation nor Threatnings albeit what is threatned does follow, nor *mala fama*, nor the Defuncts laying the blame of their death upon the person accused (called *inculpatis* by the Doctors) can infer this Crime, though all these be conjoyned; for in his opinion, nothing can be a sufficient ground to condemn a Witch, except the Pannels own Confession, or the Depositions of two famous Witnesses, deponing upon means used by the Pannel. And it is remarkable, that in the Chapter immediatly subsequent to that wherein Witches are ordinarily to be put to death, God hath expressly ordained, that *out of the mouth of two or three Witnesses every word shall be established*. And in the Process deduced against *Isobel Young* for Witch-craft, Feb. 4. 1629. and against *Katherine Oswald*, Novemb. 11. 1629. This Point is likewise debated, it being libel'd against the said *Katherine*, that by her Witch-craft she caused a Cow give Blood instead of Milk, and caused a Woman fall and break a Rib in her side. Against which it was alledged, that there was no necessary connexion there, *inter terminum a quo & ad quem, inter causam & effectum*: But on the contrary, the Cowes giving Blood for Milk might proceed from another natural Cause, *viz.* From lying upon an Aist or Emmot-hill; and therefore I think that because we know not what vertue may be in Herbs, Stones, or other things which may be applied, it were very hard to find Cures performed by the application of these, without the using Charms, or Spells, to be Witch-craft:



craft : but when these outward Applications are used, to do hurt ; as for instance, if the said *Margaret Wallace*, being at enmity with *John Clark*, and after she was forbidden to frequent his House, did continue to frequent the same, and did throw in Blood or any unusual thing upon his Wifes Pap: if the Child vvho suck'd the same had thereafter died, I think this Article, joyned vvith preceeding Defamation of her by another Witch, might have been found relevant, because she vvvas there *in re illicita*. And since the Lavv cannot know exactly vvhat Efficacy there is in natural Causes, it may very vvell discharge any such superstitious forbidden Acts, as it pleases, under the pain of Witch-craft. Nor can these vvho are accused, complain of Severity, since *sibi imputent*, that use these forbidden things against the expresse Commandment of the Lavv; and therefore since the Lavv and Practick hath forbidden all Charms, it is most just that these vvho use the same should be severely punished; vvhatsoever the pretext be upon vvwhich they are used, or after vvhatsoever way or manner, or to vvhatsoever end, whether good or bad.

X. Albeit *per leg. 4. Cod. de Mal. & Matb.* These Magick Arts are only condemned, which tend to the destruction of Mankind, but not these whereby men are cured, or the Fruits of the ground preserved; yet I have oft-times imputed this Constitution to *Tribonian*, vvho was a Pagan, and a severe Enemy to Christians, or else that it behoved to be so interpret, or that thereby Remedies, assisted by Godly Prayers, were allowed, else vvhat mean these words, *suffragia innocenter adhibita*. But, since, I am informed from the Ecclesiastick Historians, as *Zozim. lib. 2.* that *Constantine* was not yet turn'd Christian when he pass'd that Constitution; But however this Constitution is omitted in the *Basilicks*: and the Gloss says, that *in idcirco non additur*, it was not thought fit to be mentioned, in the Repurgation of the Law: And that Constitution vvvas very well reprobated by *Leo's 65. Novel.* And by the Canon Lavv, *tit. de sorti-legiis*: And the general Sanction of the former Act of Parliament leaves no place for this Distinction. Suitable to all vvwhich, *John Brough* vvvas convicted for Witch-craft, in anno 1643. for curing Beasts, by casting White stones in Water, and sprinkling them therevvith; and for curing Women, by Washing their Feet vvith South-running-Water, and putting odd Money in the Water. Several other instances are to be seen in the Processes led in anno 1661. And the Instance of *Drummond* is very remarkable, vvho vvvas burnt for performing many miraculous Cures, albeit no Malefice vvvas ever proved.

XI. Consulting vvith Witches is a relevant Ditty vvith us, as vvvas found against *Alison Jollie*, *pen. Octob. 1596.* & this is founded upon the expresse Words of the Act. The professing likewise Skill in Necromancy, or any such Craft, is by the foresaid Act of Parliament a relevant Article. For the full clearing of vvwhich Act, it is fit to know that Divination vvvas either *per damono-mantiam*, the Invocation of Pagan gods, or *Manganiam*, vvwhich vvvas the Prophecyng for invocation of some sublunary thing. *Mangania* is divided in *Necromantiam*, vvwhich vvvas a prophecyng by departed Spirits, *Udromantiam*, vvwhich vvvas a Divination by Water, &c. All vvwhich Species and Kinds of Divinations by any thing, is comprehended under the general Prohibition of Necromancy, and such like Acts: So that Predictions and Responses by the Sieve, and the Shear, and by the Book, and all such Cheats and Species of Sorcery are punishable by death in this Act: Yet these forbidden practices may sometimes be excused by ignorance, or if it can be cleared by Circumstances, that the User designed nothing but an innocent Jest or Recreation, *Delrio lib. 4. cap. 1. quest. 4.*

XII. The last Article in Criminal Libels useth ordinarily to be the being delated by other Witches, vvwhich the Doctors calls *diffamatio*, and we common  
bruit

burnt and open fame, which are never sustained as relevant *per se*. But only joyned with other relevant Articles, as is to be seen in the foresaid Process of *Margaret Hutchison*, though I think that Interloquutor very severe, since if any of the former Articles be *per se* relevant, they need not the assistance of fame and delation. Sometimes likewise, but with much more reason, Article that are of themselves irrelevant are sustained relevant, being joyned with fames and delation; an example whereof is to be seen in the 9th Article of the indictment against *Janet Cook* September 7. 1665. In which Article she was accused for having recovered a Child by Charms, with the help of another Witch; which other Witch had confessed the same when she was confronted with the said *Janet*: Likeas both of them were found lying above the Child, whispering one to another, and the blood of a Dog was found standing in a Plate beside them; which Article was not sustained relevant *per se*, but was found relevant, being joyned with fame and delation.

XIII. The relevancy of this Crime being thus discussed, the ordinary probation of it is, by Confession or Witnesses; but the probation here should be very clear, and it should be certain that the person who omitted it is not weary of life, or oppressed with melancholy. 2. Albeit, *non requiritur hic ut confiteatur corpore delicti*, this being a Crime which consists of things in animo; yet it ought to be such as contains nothing in it that is impossible or improbable. And thus albeit *Isabel Ramsay* did upon the 20 of August 1661, confess that the Devil gave her a six pence, and said that GOD desired him to give it her; and at another time a Dollar, which turned thereafter in a *Slain stone*; the Justices did not find this confession, though judicial, relevant. And to know what things are of themselves impossible for the Devil to do, or at least what is believed to be impossible, may be seen very fully treated of in *Debris*'s second Book, where it is condescended that *succubi & incubi sunt possibilis*, *id est* that the Devil may ly in the shape of a man with a woman, or in the shape of a woman with a man, having first formed to himself a body of condensed Air; and upon such a confession as this, *Margaret Lander* and others were convicted. It is likewise possible for the Devil to transport Witches to their publick Conventions, from one place to another, which he may really do, by carrying them; and sundry Witches were in Anno 1665 burnt in *Calross* upon such a confession as this.

XIV. It may be, I confess, argued, that Spirits and immaterial substances cannot touch things material, and consequently can neither raise nor transport them: but if we consider how the Adamant raises and transports the Iron, &c how the soul of man, which is a Spirit, can raise or transport the body; and that a mans voice, or a musical sound is able to occasion great and extraordinary motions in other men, we may easily conclude, that Devils, who are Spirits of far more Energy, may produce effects surpassing very far our understanding. And yet I do not deny but that the Devil does sometimes persuade the Witches that they are carried to places where they never were, making those impressions upon their Spirits, & acquainting them what was done there, which is done by impressing images upon their brain, & vvhich images are carried to the exterior senses by the animal Spirits, even as we see the Air carries the species of colours upon it, though in a very insensible way: & thus we see likewise, that the use of Wine or Melancholy will represent strange apparitions, and make us think them real. Nor ought it to be concluded that because those Witches are only transported in Spirit, or in Dreams, that therefore they ought not to be punished, since none can be punished for dreaming; and that because these Witches desire to have these Dreams, and glory in them when they are awake: nor have any these Dreams but such as have entered into a proceeding passion. I know that the Canon *Episcopi* in the Council of *Amair*, (or the *Aquilean* Council, as others call it) does condemn these transportations, as false and

meer delusions, which are impress upon the fancy of poor Creatures by the Devil, & *cum solus spiritus hæc patitur, nec non in animo sed in corpore inveniri opinantur*, but that Act of that Council does not assert all transportations to be imaginary, and Dreams, but only declares those who thought they follow'd *Diana* and *Herodias* to these publick meetings, to be altogether seduced, for these indeed were seduced, for *Herodias* being dead long since, could not be at their meetings. But from that it is unjustly concluded, that there are no real transportations, there being so many instances of these Transportations given, both in Sacred and prophane Story; and persons having been found wounded, and having really committed Murders, and other insolencies, during these transportations.

XV. Whether it be possible for a Witch to cause any person be posselt, by putting Devils into their body, may be debated; and that it is possible, appears from the History of *Simon Magus*, and many others, and is testified to be true by *St. Jerome*, in the life of *St. Hilarion*. And since Witches have confest that there are Devils who obey one another, and that there are different degrees amongst them; why may not these of an inferior Degree be forced, by vertue of a Passion with those of a Superior order, to possess men and women at the desire of Witches? Witches themselves have confest that this hath been done. And I find by a decision of the Parliament of *Tholodus* that Devils have been heard to complain in those that were posselt, that they were put there by the enchantment of such and such women: But upon the other hand, it is not to be imagined that Devils would obey mortal Creatures, or that GOD would leave so great a power to any of them to torment poor mortals: And the Devil, who is a liar from the beginning, is not to be believed, in saying that he is put there by Inchantments, and though he make such promises to Witches, yet he does in these but cheat them: and if the Devil could possess at pleasure, we would see many more posselt than truly there are.

XVI. The Devil cannot make one solid body to penetrate another, *Quest. 17.* and therefore I think that Article libel'd against *Margaret Hutchison*, of comming to *John Clark's* house; when doors and windows were shut, should not have been admitted to probation, since it is very probable they would have searched the house after the second or third nights fear; and she could not penetrate doors nor walls.

XVII. The Devil cannot transform one species into another, as a woman into a cat, for else he behoved to annihilate some of the substance of the woman or create some more substance to the cat, the one being much more than the other; and the Devil can neither annihilate or create, nor could he make the shapes return, *nam non datur regressus à privatione ad habitum*: But if we consider the strange tricks of Juglers, and the strange apparitions that *Kercher* and others relate from natural causes, we may believe that the Devil may make a woman appear to be a beast, & *è contra*, by either abusing the sense of the beholders, or altering the Medium, by inclosing them in the Skin of the beast represented, or by inclosing them in a body of air, shap'd like that which he would have them represent, and the ordinary relation of the witnesses, being wounded, when the Beast was wounded, in which they were changed, may be likewise true, either by their being really wounded within the body of air in which they were inclosed, or by the Devils inflicting that wound really himself, which is *Delrio's* opinion. But it would seem hard to condemn any person upon the confession of what seems almost impossible in it self: And cannot allow instances in the Journal Books, where poor creatures have been burnt upon such confessions, without other strong adminicles.

XVIII. The Devil may make Bruits to speak, or at least speak out of them *Quest. 18.*

He



He can also raise storms in the Air, and calm these that are raised, *Quest. 11.* And yet it being libell'd against *Janet Cock*, that she said to these who were carrying a Witch to be execute, *were it not a good sport if the Devil should take her from you?* Likeas a great storm did overtake them when they were carrying her to the place, it having been a great calm both before and after; yet this Article was not sustained relevant, since it might have proceeded from folly, or jest, or *vana jactantia*.

XIX. The Devil may inflict diseases, which is an effect he may occasion *applicando activa passivis*, and by the same means he may likewise cure: A clear instance whereof appears in the Marriage-knot. And not only may he cure diseases laid on by himself, as *VVierus* observes, but even natural diseases, since he knows the natural causes & the origin of even these natural diseases, better than Physicians can, who are not present when Diseases are contracted, and who being younger than he, must have less experience. And it is as untrue that *Divus Thomas* observes, who asserts that cures performed by the Devil cannot continue, since his cures are not natural. And since he both may make sick, and may make whole, it follows that he may transfer a disease from one person to another. And I find that it being libell'd against *Margaret Hutchison*, that she took a disease off a Woman to put it on a Cat: It vvas alledged that this Article vvas not relevant, because, 1. *Una saga non potest esse ligans et solvens in eodem morbo.* 2. That in such transactions as these the Devil never used to interpose his skill, except vvhether he vvas a gainer; & therefore though he vvould transfer a disease from a bruit Beast to a rational Creature, yet he would never transfer a Disease from a rational creature to a bruit beast; both these defences vv ere repelled. Many Witches likewise confess that they cannot cure diseases, because they are laid on by Witches of a Superiour order, vvho depend upon Spirits of a higher degree.

Some think that they may innocently imploy a Witch to take off the disease imposed by another, and lay it upon the Witch vvho imposed it, even as men may innocently borrow money from an Usurer, to be employed for pious uses, or may cause an Infidel to swear by his false Gods, for eliciting truth: and that in this manner Devils are rather punish'd than serv'd. But since all commerce with Devils is unlawful, this practice is justly reprobated by *D. Autun. p. 2. discourse 48.* But yet it is thought lawful to all who are bewitched to desire the bewitchers to take off the disease, if it can be removed without a new application to the Devil, but only by taking away the old charm; or it is lawful to any to remove the charm or sign of it, if it be in their power, *D. Autun. pag. 825.*

XX. Witches may kill by their looks, which looks being full of venomous spirits, may infect the person upon whom they look, and this is called *fasciatio Physica, sed fasciatio vulgaris, quæ dicitur fieri per oculos tenerorum puerorum vel parvorum porcorum vana est & ridicula, Del. lib. 3. Q. 4. Sect. 1.*

I know there are who think all kinds of fascination by the eyes, either an effect of fancy in the person affected, or else think it a meer illusion of the Devil, who perswades Witches that he can bestow upon them the power of killing by looks, or else the Devil really kills, and ascribes it falsely to their looks: vvhereas others contend that by the received opinion of all Historians, men have been found to be injured by the looks of Witches: and why may not Witches poyson this way, as well as the Basilisk doth? Or why may not the Spirits in the Eye affect as well as the Breath? Or why may not looks kill as well as raise passions in the person lookt upon? Nor can it be denied but that blear'dness is begot by blear'dness; and that menstruous women vvill spoil a Mirour by looking upon it. Likeas there seems even some ground for it in Scripture; for, *Dent. 28. 54.* it is said, *that a mans eyes shall be evil towards his brother.* And some likewise endeavour by consequence

from *Matth. 20. 15*: *Is thine eye evil*: the word *ἁρμάρω* signifying in Scripture both to bewitch and to envy. Some likewise think that *St. Paul Gal. 3. 1.* alludes to this received opinion, but conjecture doth so much over-rule all this affair, that it were hard to fix crimes upon so slender grounds: And therefore though where Witches confess that they did kill by their looks, their confession and belief may, if they be otherwise of a sound judgement, make a very considerable part of a crime, where it is joyned with other probabilities, yet *per se* it is hardly relevant.

XXI. It may be also doubted whether Witches can by amorous potions enchant men or women to love: and though it may seem that these being acts of the soul, cannot be raised by any corporeal means, yet *l. 4. c. de Malef. & Mathemat.* makes this possible, and punishable, *eorum scientia punienda, & severissimis merito legibus vindicanda, qui magiis accincti artibus pudicos ad libidinem defixisse animos deteguntur*: But this Law speaks only of lust, and not of love, as I conceive. Nor can it be denied, but that not only Witches, but even Naturalists may give Potions that may incline men or women to lust. And therefore the question still remains, whether Witches may incline men or women by Potions to a fancy and kindness for any particular person; and though Potions may incline men to madness, yet it doth not follow that therefore they may incline them to love. And though *D. Autun* doth bring many Arguments from History, and pretends that the Devil may raise and excite the old species of love which ly hidden in the body, and may thereby form a passion, yet these are too conjectural grounds to be the foundation of a criminal sentence. The *Basticks* make the punishment of this to be deportation, and so supplies the former Law.

XXII. Witches do likewise torment mankind, by making Images of Clay or Wax, and when the Witches prick or punse these Images, the persons whom these Images represent, do find extream torment, which doth not proceed from any influence these Images have upon the body tormented, but the Devil doth by natural means raise these torments in the person tormented at the same very time that the Witches do prick or punse, or hold to the fire these Images of Clay or Wax; which manner of torment was lately confess'd by some Witches in *Inverness*, who likewise produced the Images, and it was well known they hated the person who was tormented, and upon a confession so adminiculat, Witches may very judiciously be found guilty, since *constat de corpore delicti de modo delinquendi & innimicitiiis praviis*.

XXIII. It is ordinarily doubted whether Confessions emitted before the Kirk Sessions in this case be sufficient: But this I have treated more fully in the Title of Probation by Confession. Only here I shall observe, that *Christian Stuart* was found Art and Part of the bewitching *Patrick Ruthorn*, by laying on him a heavy Sicknes with a black Clout, which she her self had confess'd before several Ministers, Nottars, and others, at divers times; all which confessions were proved: and upon these repeated Confessions she was burnt, *Nov. 1596*. *Margaret Linder* was convict upon confession emitted before the Magistrats and Ministers of *Edinburgh*, albeit past from in Judgement, *Dec. 9. 1643*. see that Book of Adjournal, pag. 349. And if the Confession be not fully adminicular, Lawyers advise that Confessors should be subjected to the Torture, which is not usual in *Scotland*. And it is very observable that the Justices would not put *James VVeleh* to the knowledge of an Inquest, though he had confess'd himself a Witch before the Presbytery of *Kirkcudbright*, because he was Minor when he confess'd the Crime, and the Confession was only extrajudicial, and that he now retracted the same; but because he had so grossly prevaricat, and had delated so many honest persons, they ordained him to be scourged and put in the Correction-house, *April. 17. 1662*. It was proved

proved against *Margaret Wallace*, March 20. 1622. that she said that if it could be proved that she was in *Greg's House*, she should be guilty of all the Ditty; and therefore it being proved that she was in *Greg's House*, that Probation was alledged by the Advocat to be equivalent to a Confession, as was found against *Patrick Cheyn*: To which it was replied, that this could amount to no more than a Lie; and in my opinion, it could not have even the Strength of an extrajudicial Confession, but rather imported a denial of the Crime.

XXIV. The Probation by Witnesses in this Crime is very difficult, and therefore *socii criminis*, or other confessing Witches are adduced; but though many of them concur, their Depositions solely are not esteemed as sufficient, *ne vel ad panam extraordinariam imponendam*, though some think the same sufficient to that end, because of that general Brocard, *ex multiplicatis indiciis debilibus resultare inditia indubitata*: But *Dalrio* asserts, that the conjection of such testimonies is not sufficient, *Nunquam enim*, saith he, *qua sua natura dubia sunt, possunt facere rem indubitamur nec multa agra unum sanum, nec multa non alba unum album, nec multa tepida unum calidum*. And that the testimony of one confessing Witch was found not sufficient to file the Pannel, is clear by the Process of *Alison Jollie*, who was assoilzied pen. *Ozob. 1596*. *Albeit Janet Hepburn*, another Witch confest that the said *Alison* had caused her bewitch *Isobel Hepburn*, whereof she died; but though Witch-craft cannot be proved *per socios criminis*, though dying and penitent Witches, yet it may be doubted if the consulting Witches may not be proved by two Witches who were consulted: for if this be not a sufficient probation, it would be impossible to prove consulting any other manner of vway.

The persons to whom the injuries are done by the Witches are admitted to be Witnesses: thus *Katherine Wardlaw* was admitted against *Margaret Hutchison*; but sometimes they are only admitted *cum nota*, if the probation be not otherwise weak, and thus *William Young* and *Agnes Hutchison* were only admitted *cum nota* against *Beatrix Leslie*, August 1661. And in that Process likewise they received only *Agnes Ross cum nota*, because she was the Mistress of the two Women who were maleficiat. *Neilson* was admitted to be an Assizer against *Margaret Wallace*, though he was Brother in Law to *John Nicol* who had given information for raising the Ditty, because the Ditty was not at *Nicol's* instance; and yet *Starling* was set from being an Assizer, because *Moor* who was alledged to be one of the persons maleficiat was his Brother in Law. March 2. 1662. *Dickson* was there likewise admitted to be an Assizer, though he assisted the Bailie in taking her, which was found the Office of a good Citizen, and though he had deadly feud against her Husband, since it was not proved he had any thing against her self.

Women are received Witnesses in this Crime, as is clear by the Process against *Margaret Wallace*, and all the Processes in August 1661. The not shedding of tears hath been used as a mark and presumption of Witch-craft, *Sprenger. mal. malef. p. 3. q. 15.* because it is a mark of impenitence; And because several Witches have confest they could not weep: But the being accused of so horrid a Crime may occasion a deep Melancholy, and Melancholy being cold and dry, hinders the shedding of tears: and great griefs do rather astonish than make one weep.

XXV. The punishment of this Crime is with us death by the foresaid Act of Parliament, to be execute as well against the user as the seeker of any response or consultation, & *de practice*, the Doom bears, to be worried at the Stake, and burnt.

By the civil Law, Consulters were punished by death, l. 5. *C. de malef. & mathem. nemo aruspice consulat, aut mathematicum; nemo ariolum, augurum et vatem prava confessio conticescat sileat omnibus perpetuo, divinandi curiositas*. In



which Law, Fortune tellers are also punishable : though with us, dumbe persons who pretend to fortel future events, are never punished Capitally, but yet I have seen them tortured, by order from the Council, upon a representation that they were not truly Dumb, but ( feigning themselves to be so ) abused, and cheated the people. The forsaide Law is renewed in the *Basilicks* l. 31. *Α. 1.* *ἡ δὲ ἐκείνη τὴν μαρτυρίαν ἐν ἀρχαῖοις τοῖς δὲ χαλδαίοις καὶ οἱ μάγοι μὲν ἐν αὐτῇ ταῖς μαρτυρίαις αὐτὸν παρὰχρῆσαν, ἀλλὰ δὲ κελεύειν τὴν δὴν εἰ δύναντο τιμωρία ἐκποιεῖσθαι.* But *Farin.* and others thinks, that where no person is injured, Death should not be inflicted ; and that Imprisonment and Banishment is novv practised by all Nations in that case, *Lib. 1. Tom. 3. quest. 20. Num. 89. & Clarus. § heresis num. ult.* But *Perezus* thinks this too favourable a Punishment except the users of these curious Arts vvere induced thereto, out of meer simplicity, *Ex sine dolo malis* but vvith us no such Distinction can be allowed by the Justices, vvho must find all Libells relevant, vvch bear Consulting vvith Witches, and that Ditty being proved, they must condemn the Pannel to die ; albeit I think the Council may alter the Punishment, if it be clear that the User of these Acts had no vvicked Design nor Intercourse vvith the Devil therein.

XXVI. By the Law of England Witch-craft was of old punished sometimes by Death, and sometimes by exile ; But 1. *Jac.* this following Statute was made, which I here set down, because it is very special.

If any person or persons shall use, practise, or exercise Invocation or Conjurati-  
 on of any evil and wicked Spirit, or shall consult, covenant with, entertain, em-  
 play, Feed or Reward, any evil or wicked Spirit ; to, or for, any intent or pur-  
 pose, or take up any dead man, woman, or child, out of his, her, or their grave,  
 or any other place where the dead Body resteth, or the Skin, Bone, or any part of  
 a dead person, to be imployed or used in any manner of Witch-craft, Sorcery,  
 Charme, or Inchantment ; or shall use, Practise, or Exercise any Witch-craft,  
 Inchantment, Charm or Sorcery, whereby any person shall be Killed, Destroyed,  
 Wasted Consumed, Pined, or Lamed, in his, or her Body, or any part thereof:  
 that then every such Offender or Offenders, their Aiders, Abettors, and Counsell-  
 ors, being of any the said Offence, duly and lawfully convicted: and attainted, shall  
 suffer pains of Death, as a Fellow, or Fellons, and shall lose the priviledge, and  
 benefite of Clergie ; and Sanctuary. If any person, or persons, take upon  
 him or them, by Witch-craft, Inchantment, Charm, or Sorcery, to tell or de-  
 clare, in what place any treasure of Gold, or Silver, should or might be found, or  
 had in the Earth, or other secret places : Or where Goods or other things lost,  
 or stolen, are become : Or whereby any Cattel or Goods of any person, shall be de-  
 stroyed, or to hurt or destroy any person in his, or her body, albeit the same be not  
 effected or done ; being therefore lawfully convicted, shall for the said Offence  
 suffer Imprisonment by the space of a whole year, without Baile or Mainprise.  
 Once every quarter of the year these Mountebanks are to mount the Pillory, and  
 to stand thereupon in some Mercat Town six Hours, and there to confess his or her  
 Error, and Offence.

# TITLE XI.

## Murder.

- 1 The Etymologie of Murder.
- 2 Self-defence defined, and whether it be punishable.
- 3 How Moderation in self-defence is said to be exceeded.
- 4 How self-defence must be proponed.
- 5 How it ought to be proved.
- 6 What is casual homicide.
- 7 Whether he who was doing what was unlawful, may defend himself as only guilty of casual homicide.
- 8 Whether he who is only guilty of casual homicide may be fined.
- 9 What is homicidium culposum, or faulty homicide.
- 10 What wound is to be judged mortal.
- 11 How the design of Murdering or fore-thought-felony is to be cleared.
- 12 Homicidium in rixa when many are conjunct Actors, how punishable.
- 13 The killing of Thieves, or such as resist Authority, how punishable.
- 14 Whether it be lawful for a Father to kill his own Daughter, if he find her committing Adultery.
- 15 Assassination, how punished.
- 16 Murder under trust, how punished.
- 17 What is art and part of Murder.
- 18 How such as kill in the execution of Law, are punishable.
- 19 Whether it be lawful to kill a Rebel.
- 20 The Liferent-escape of Murderers falls in some cases.
- 21 Murder is one of the Pleys of the Crown.
- 22 How Sheriffs and other Judges ought to prosecute Murderers.
- 23 Whether Remissions can be granted in case of Murder.

**G**OD Almighty did to the Honour of impressing man with his own Image, add as a second Obligation, a natural Horror in every Man to be in any accession to the defacing it; so that he has consulted his own glory, and our Security, joynly in these severe Laws which he has made against Murder. And his divine Finger is not seen so apparently, in any discovery, as in that of Murder: and it is very remarkable, that these Barbarians, who saw the Viper fasten upon Pauls hand, did instantly conclude him guilty of Murder, because he was ( to their apprehension ) so miraculously punished.

I. Murder comes from the Dutch word *Moorde*, which signifies, *cadem ex insidiis vel proditorie factam*. Math. h. t. And Murder is properly different from Slaughter, the one being committed *per feloniam*, the other *per infortunium*, Leg. Malc. c. 2. And therefore when our Law forbids killing under trust, Ja. 6. Pa. 11. Ch. 81. It calls it Murder under trust. But when it speaks of killing by accident, or in self-defence, it calls it Slaughter, or Homicide. c. 22. Par. 1. K. Ch. 2. Sec. 2. And by this it seems that this Crime is better writ Murder than Murther, though Murther be the ordinar way of writing it, especially in our old Law.

The Civilians define Murder to be the killing man by man unlawfully. And they divide it into that which is committed casually, in defence, culpable, or wilfully.

II. *Necessarium Homicidium*, or homicide committed in self defence is when a man being pursued or reduced to inevitable necessity, has no way left him to evite his own death, but by killing the Aggressor: This is in law called *inculcata tutela*, or *moderamen inculcata tutela* within which moderation, if the defender contain himself, he is no way punishable, but if he exceed the same, yet so favourable is self defence, that the exceder is not lyable to the ordinar punishment but is ordinarily punishable according to the excess, at the discretion of the Judge. With us likewise self defence is only punishable at the arbitrement or discretion of the Judge by the 22. *act. Sess. 1. Pa. 2. K. Ch. 2.* But seeing that act ordains it to be punishable at his discretion it may be doubted if in all cases self defence be not some way punishable. And I remember that Captain Barclay being assyzed in Dec. 1668. Because the Assyze found that the killing *Sinclar* was in his own defence, the pursuers were to petition the Council (which is the ordinar way of taxing arbitrary punishment in this case) that he might be fined. And very learned Lawyers, were of opinion, that self defence was in all cases punishable though attended with the most favourable circumstances of innocency; from whom I differed upon these reasons, 1. by the Civil Law and the opinion of the Doctors, if the defender contain himself exactly within that moderation, he is no way punishable, as is clear by *Farin. part. 74. quest. 25. part. 6. 2.* Self defence is a duty, and so not punishable; for it were against reason that the Law should punish what it doth command. 3. The Law sayes that *omni culpa caret qui se defendit*, and in our Law it is called *murdrum justum*, *leg. Malcol. c. 11.* and so to punish him who necessarily defends himself, were to inflict a punishment where the Law acknowledged there were no guilt. 4. It should be in the power of every malicious rascal to wrong the most innocent, for either he behaved to suffer himself to be killed, or to be punished by defending his own life: And by the said act, it is only declared leisum to punish but not necessary. And yet by the Law of England, Murderers *se defendendo* forfault their moveables, and both in that and in murder, upon misadventure (for so they call casual homicide) the murtherer must have a pardon, *Statute 6. E. 1. cap. 9.* So great a regard, sayes *Bolton*, the Law hath to the life of a man, *cap. 15. num. 16.* And by the Law of Savoy he who kills, though in self defence, needs a pardon, but the Prince in that case cannot refuse to grant a pardon. And therefore their Lawyers calls that pardon *gratia justicie* *Cod. fabr. lib. 9. tit. 16.* but with us, no pardon is requisite, albeit it is most ordinar to take remissions in such cases, bearing self defence in their narrative.

III. This moderation is said to be exceeded in these thre, viz. in Armes, 2. In time, 3. In the measure of following, striking, &c. If his moderation is exceeded in Armes as if the aggressor have only a staff, and the defender wound him with a sword or pistol; the defender is in that case punishable, for there were no reason in that case the defender should have had any fear of his life, *nec erat in dubio vite constitutus*. And yet this conclusion is not infallible, for if the defender was much weaker than the aggressor, he might be excused to use such unequal Weapons. The defender is said to exceed in time, if he strike the aggressor, *ante quam sit in actu proximo occidendi*, for else it should be lawful to every man, upon the first apprehension of fear, to kill the aggressor, which were very dangerous: and here it may be doubted, if vvhhen any aggressor threatens to kill, if the defender vvhho knows not vvhhen the threat may be put in execution, may immediatly kill. There are probable reasons to be urged for either opinion: And albeit the punishment should in this case depend upon the arbitrement of the Judge, yet if the aggressor be knowvn to have any design

to



to Murder, or be a person vvho uses to execute vvhat he threatens; and if he have a Svword, though not dravvn, or a Pistol, though not cockt: (For if he have either of these, there is no doubt but he may be lavvfully killed, because he is in *actu proximo offendendi*, and no man should vvait till he killed) I think that though the aggressor be killed, yet the defender hath the benefit of self-defence; and albeit he may be arbitrarily punisht, yet he cannot be punished with death: and many Lawyers are of opinion, that he who threatens to kill, may be killed, which opinion they found upon these reasons, 1. Because the Law looks upon that which is unlawful, as done, if it was intended to be done, and that *in odium* of him who designs what is unlawful. 2. There is greater fear from some threats, than from wounds; and therefore, seing it is lawful to kill these who assault us with wounding, why not, and him who threatens? 3d. *per. l. 1. C. quando licet cuique, &c. Mortem inquit imperator quam minabatur accipiet & id quod intendebat incurrat*, nor can the friends of the threatner complain, seing the aggressor was in effect author of his own death, And it is clear that the defender had no design to kill. Yet the Justices would not sustain, *mina per se*, to be a sufficient qualification of self-defence, but sustain'd it joyntly with the aggressors fying a pistol, though it mis-gave, and though the defender might have fled, *January 1668. Sinclair contra Barclay*. And albeit by the Canon Law, *insultatus debet fugere*. And that by the Law of England, he who is invaded, is obliged to flee as far as he can as to a Wall or Ditch, *Bolt. cap. 15. num. 17*. Yet by the opinion of the Civilians, a person invaded is not obliged to flee far, *Farin. quest. 125. P. 2*. It may be probable, that if the defender was alone in a house, or place with the aggressor, and could expect no help, that upon threatning or other probable designs laid against his life, he may kill the aggressor; and from which may be deduced, that the *actus proximus* which Lawyers speak of, must not be interpreted, only the having a sword drawn; for if a stronger man have a weaker in a lockt house, and threaten, he may kill him, though a sleep, if he cannot otherwise escape.

The Defender is said to exceed in the measure also; if he killed him for wounding, whom he might have shun'd: or if he followed the Aggressor, which though it be not tully lawful, yet *fugientem persequens dummodo in ipso actu non punitur pena ordinaria licet occiderit*, *Boer. decis. 168. Novemb. 7*. And albeit much be left to the arbitration of the Judge, as to all the three, *arma tempus & modus*: yet the general rule is, that if the Defender exceed only in either of the three, as, *v. g.* in the Arms, or Time, the excess is said to be *culpa levissima*, and no way punishable: if in two of these, as in Time and Arms, then it is accounted *culpa levis*, and is somewhat punishable: but if the Defender exceed in all the three, as in Time, Arms, way of Prosecution, then it is *culpa lata*, but yet he is not punishable, as if he had *dolose* Murdered, for though it be a rule in *civilibus* that *culpa lata equiparatur dolo*: Yet it is a rule in *criminalibus* that *culpa lata nunquam equiparatur dolo ubi agitur de pana corporis afflictiva* *Far. quest. 125. part. 6*. It is also controverted amongst Lawyers, if seing Honour is as dear as Life, it be lawful to kill him who asperges our Honour, as it is lawful to kill him who assaults our Life. And albeit *Farinacius* be of the judgment, that he who is thus provok't, being a person of far more eminent condition, than the injurer killing him is not to be punisht as a Murderer, *sed pena extraordinaria licet injuria sit verbalis*; yet in my judgment he errs in that Position; for in effect, that is not Self defence (because the verbal Injury cannot be retreated, nor retain'd) but it is Revenge: yet *dolor justus aliquando operatur ut pana ordinaria temperetur*, *Boer. decis. 237*. but yet that is not allow'd in killing, and such other Injuries, *qua non possunt revocari*,

Gothofr. *prax. crim. §. homicid.* N. 25. and albeit this hold in verbal Injuries offer'd to our Honour, *ubi nescit vox missa reverti*: yet if the injury offer'd to our Honour be real, and such as may be stopt, as by commanding an eminent person to loose down his Breeches to be whipt, or do any most ignominiously servile Act to the aggressor, in that case, I should think that the killer should not be capitally punisht, albeit he was in no hazard of his life. I likewise think that the fear of Imprisonment by the Defender, may excuse from capital Punishment, seeing Liberty is as dear as Life; and no man can be secure of his Life, if he be unjustly imprisoned, & *sibi imputet aggressor qui si occasionem præbuit*. It is likewise lawful to kill such as would murder our Friend, or Fellow-traveller, which is accounted lawful, though not Self-defence, which is extended also to the defence of all others, because we should love our Neighbour as our selves. And it is lawful to kill a Thief, who in the Night offers to break our Houses, or steal our Goods, even though he defend not himself, because we know not but he designs against our Life: & Murder may be easily committed upon us in the Night: but it is not lawful to kill a Thief who steals in the day time, except he resist us when we offer to take him, and present him to Justice.

IV. This exception of Self-defence, must be propon'd against the relevancy, and must be condescended upon, thus the Pannel no ways acknowledging the killing; yet if he killed, it was done in his own Defence, in swa far as the Defunct drew a Sword, and thrust, or offer'd a Pistol, &c. And the Justices will not allow that it should be propon'd to the Assize, as I have oft heard this press'd, but very unreasonably; for this concerns the relevancy, to which the Justices, and not the Assizers are only Judges competent: And it were very dangerous to refer to ignorant Assizers, Matters of such importance, and which are oft so intricat *in jure*. And whereas it may be urg'd, that Art and Part is referred to the Assize, and is not condescended upon, and made relevant. It is answered, that the Accuser cannot know the accession of the Pannel, till the Witnesses first condescend upon it: but the Pannel cannot but know all the circumstances of his own Self-defence, & is not to learn that from others: But yet though the Proposer of a Defence, do's *in civilibus* acknowledge *eo ipso* the Libel: yet *in criminalibus*, though the Defender, or Pannel prove not his exception of Self-defence, he will not be condemned, except the Pursuer prove the Libel.

V. The way of proving this Self-defence, was by raising a Precept of Exculpation, but is now only by a Summons, which expresses not so particularly the Defence in all its circumstances, but that it may be hereafter help'd, which it seems is unjust, for the Pannel should know what himself did: nor should a Judge grant a Precept for Exculpation, till he see that there be some ground for craving it.

This exception of Self-defence is so favourable, that it may be prov'd by Presumptions, by Witnesses, otherways declinable, as Cousins, Servants, and Witnesses, who depone only upon credulity; and the Defence it self being once prov'd, it is presumed that it was done necessarily, and lawfully, & *potius ad defensionem quam ad vindictam*, *Far. quest. 115. part. 7. §. 1.* And yet our Law allows no Witnesses to be receiv'd in Defence, but such as it allows Pursuits and Witnesses led in Defence, are more to be suspected; for men are naturally inclined to go all lengths in bringing off the Pannel; and for this cause it is, that we have Assizes of Error against such as absolve a Pannel: but none against those who condemn him.

Before this Act of Parliament, Self-defence was still sustain'd by the Justices, to elide the Libel of Murder, but it was oft ineffectual, seeing there were no Precepts of Exculpation then us'd; and consequently, except either the Pannel could

could have prov'd the *inculcata tucla* by the Accusers own Witnesses, who were led to prove the Murder, ( which was not secure, seing these who saw the beginning of the Scuffle, and first Aggression, might have been absent when the Aggressor was killed ) or that the Witnesses would have voluntarily appeared ( which was a probable reason to set them, they being *eo casu testes ultionii*, ) the Defence could not have been proved. Whether Self-defence will defend, or is lawful in *Paricid.* See more of this Title Exculpation.

VI. *Homicidium casuale*, is when a man is kill'd casually, without either the fault, or design of the Killer, as if an Ax-head should fall off, and kill a By-stander: or a Rider should kill with his Horses feet: In which case our Law appoints, that if the prejudice be done by the Horses foremost feet, then the Rider shall be forc'd to satisfy for the Prejudice done: and these Satisfactions are called *Croo* or *Galnes*; but where it is there said, that he shall give *Croo* or *Galnes*, as if he had killed him himself; it is to be interpret, not as if the Rider should be punishable in that case, as if he had killed him with his own hand: but that the Assythment shall be the same. But the Rider is not lyable at all for what prejudice is done by the Horses hinder feet, *lib. 4. Reg. Maj. C. 24.*

Casual Slaughter, or Homicide, then is that which is occasioned by mistake and just ignorance, for if it proceed from affected ignorance; as for instance, if a man will not know what he may know, his ignorance in that case will not make the Murder following upon it, to be constructed casual homicide; but if it proceed from gross and *supina ignorantia*: it may be punishable by an extraordinary, or arbitrary punishment, but not by death. And since such ignorance is a fault, the Murder occasioned by it becomes *culposum*, or faulty homicide; as seems to me clear by *C. continebatur & c. lator de homicid.* It is then necessary, that the committer us'd all exact diligence to evite the Crime, else he is not in the case of casual homicide. Further instances whereof, are, if a Mason before he throw down Stones, advertise all below, though in throwing he kill, he is to be cleared as innocent. Or if a Hunter shoot at a Beast, but a man come in the way and be killed: and yet if either the Mason cry not, or if the Hunter did shoot in a place where people use to be, he is guilty of faulty Murder, in these cases which shews clearly the difference betwixt these two kinds of Murder.

VII. If the killer be employed about a thing unlawful, either in it self, or unlawful to the actor, the murder ensuing is thought still casual Murder, since Murder was not design'd, if the committer did exact diligence to shun all Murder; as for instance, to carry Guns is unlawful with us: and to hunt is unlawful to Priests by the Canon Law. If then a man having a Gun illegally, should lay it up securely: or a Church-man should kill a man, whilst he did shoot at a Beast in a remote place; these Acts would not infer Murder because there was no Act done there, with relation to Murder, *Covar. ad clement. si furiosus*, and yet the committer, *versatur in actu illicito*. But yet others are of opinion, that if the committer be doing what is unlawful for him, he commits murder, *Tho. Aquin 22. quest. 69. Act:* because he do's not at all that he ought to do in that case, to evite Murder, since what he does is unlawful: But I think they may be thus reconciled, *viz.* if the committer do what is against the Law of Nature: or what is criminal, he should be lyable: or if what he does, may probably produce ill consequences, and Murder, though he design'd not the same: in all which cases he ought to be lyable. And it seems to be reasonable, that he who killed, when he was doing what was unlawful, may be arbitrarily punished, though he did exact diligence to shun Killing.

VIII. When *homicide* is casually committed, some think that because there



is no design to kill, therefore the killer ought no way to be punisht. Others think him lyable to an arbitrary punishment, or fine, & *quod Wergeldum solvere tenetur. Wesemb. parat. ad l. Corn. de Sicar. num. 27.* A third Sect of Lawyers distinguish so, that if there proceeded no fault in the committer, then he is lyable in no fine, or to no punishment: but that he is, if any fault of his preceeded. But it seems that if any fault preceeded, the Murder is not casual, but is *culposum*; and so the distinction meets not the state of the question: and it seems to me, that by *lib. 1. S. 3. ff. ad l. Cor. de Sicar.* all casual homicide deserves some punishment. And since some Lawyers think, that Murder in self-defence excuses not from all punishment: much less ought casual Murder, since self-defence wants not only a design to Kill, but is a duty in itself.

IX. *Homicidium culposum*: or faulty Slaughter, is where the Murder was not design'd; and yet it was committed meerly by accident, as if one should hound a Dog at another, who should bite him at whom he was hounded, so that he should dy thereby; or if one should strike with a Batton, when he had a Sword; in these and the like cases, the offender is to be punished arbitrarily: but because *aberat animus occidendi*, this is not properly Murder, and so is not punishable by Death; but is punished according to the quality of these circumstances, which attend the Fact.

For clearing this difficulty, the Doctors say, that either the Killer is guilty only of *culpa levis*, aut *levissima*, and in that case he is no way punishable; nor is there any difference, inter *homicidium casuale* & *homicidium per culpam levem* aut *levissimam commissum*, and this was found in the case of Nicolson, who being pursued for Murder, it was alledged that it was but *homicidium casuale*, or *culposum*, for in struggling, his Gun being a half-bend, went off; nor knew he ever the Defunct, and so could have no Malice against him. To which it was replied, that the carying of Guns is forbid by the Law; and he the Defunct was in *actu illicito*: nor should he have carried a Gun which used to go off, & *versans in actu illicito nunquam excusatur*: Which Reply the Justices repelled, *June 24. 1673.* For they thought that the Law against wearing Guns, was in defect as to Fowlers, whose Trade it was, & *omni culpa caret qui facit id quod omnes facere solent sed si sit lata culpa*, it is to be punished arbitrarily, but not by death, *nam lata culpa nunquam equiparatur dolo ubi agitur de pena corporis afflictiva.*

X. Since the design of Killing depends much upon the nature of the Wound given, Lawyers conclude, that where the Wound was not deadly, or *vulnus lethale*, as they call it, the Inflicter of the Wound cannot be punished, though the Party Wounded thereafter died. And though some Lawyers be of opinion, that if the Party live three days after the receiving of the Wound; the Wound is thereby presumed not to be mortal, *Accurf. in l. 1. C. de emendat. serv.* yet generally this is referred to the arbitrimt of the Judge; who is in this to follow the opinion of Physicians, or of one Physician, if more were not present: but if they vary, then the Judge should incline to punish, not by death, but by an extraordinary punishment: For Murder is not to be infer'd, but from a concluding Probation, *Gail. observ. 111. lib. 2.* and if the Wound be but small, and a Fever follow, then it is presumed that the Party dyed rather of a Fever, than of the Wound; especially if the person Wounded walked a foot for fourty days, *Gomes Var. resol. lib. 3. cap. 3.* And yet in Dec. 1669. Mr. William Somervel was found guilty of the Murder of Bessy Rentonn, though it was alledged that the said Bessy got only a Wound with a Batton, that she never took Bed, but travelled five Miles that night a foot, and served as an ordinary Servant eight Months thereafter, till she died of a Fever; with which her Brother infected her: all which was repelled, because

cause this Alledgance was contrair to the Libel : Wherein it was expressely libelled, that the Wounds were mortal; and though, where the Wounds are not libelled expressely to be mortal, such a Defence might be admitted. And the Judge ought to consider *intervallum temporis*, or *supervenientia febris*; yet these, nor no Presumptions ought to be received, where the Wounds were offered to be proved to be Lethal: But this Decision was so ill liked, that the Council recommended Mr. *VWilliam* to his Majesty, who granted him a Remission. And since Judges may be so arbitrary in so great a concern, I should wish that the various periods of Nature, in its cures, and the various Determinations of Judges, were, as to the Criminal Procedure, fixed to some certain time. And that therefore, seing ordinarily Wounds that are mortal, do kill the Receiver in forty days; I wish that it were therefore generally concluded that he who dies thereafter, dies not of his Wounds, if he has walked a-foot till that time, *Vid. Zach. Quest. Medicolegal.* But by the Law of England, if the Person wounded die within year and day after his Wound, it is presumed he died of his Wounds, *Cook P. 53.*

There was another Decision upon this Subject, the 13. of July 1674. *James Mason* being pursued for killing *Ralston*, alledged that he could not be guilty of Murder, since *Ralston* followed him all that day from house to house, and having at last put violent hands in the Pannel, he was forced to throw him off him & his Head fell upon a Stool & bled; which Wound he took no pains to cure, but stayed in the Streets in the night time: and though the Wound was found not to be mortal by the Chirurgians, yet by cold and drinking, he killed himself, *ex malo regimine*, and when it was replied, that this could not amount to self-defence, since the killer was not in *periculo vite constitutus*: it was duplied, that the violence done, was proportionable to the violence offered the Aggressor, and so exceeded not *moderamen inculpata tutela*; for the said Pannel struck not him with any mortal Weapon, but only gave him a thrust with his hand, which was necessary to throw the Defunct off him. Upon which debate, the Justices sustained the Libel, only to infer *panam extraordinariam*; and remitted also the Pannels defences of casual homicide, self-defence, and that the Wound was not mortal, to the knowledge of the Inquest.

XI. It is here controverted, whether he who intended to kill one, by mistake killed not him, but another, be punishable as a Murderer; seing as to the person killed, the Murderer had no design: yet I think he should die, seing the design of killing a man, and not any one particular man, is Murder; and the killer intended to deface God Almightyes Image: and to take from the King a Subject. And I find that this is determined to be Murder by *Bolton, cap. 11. num. 24.* by whom likewise it is given as a rule, *nihil interest utrum quis occadat an causam mortis praebeat.*

And thus a Son for having carryed his Father (being sick) in a frosty night, from one Town to another, was executed as a Murderer, because the Father died. And a Harlot having exposed her child in an Orchard, where a Kite killed it, was execute as a Murderer, also & *ibi voluntas reputatur pro facto*; And if this were not Murder, this Crime might be Palliated under other shapes.

This Defence, *viz.* that the killer had no design to murder, is a Negative and so can only be proved by presumptions, as if there was no deadly feud formerly amongst the Parties. 2. If the Parties were Kins-men or intimats. If the killer struck with a staff, having a Sword or Pistol, or having these, struck only with the hilts of his Sword, or with the head of his Pistol: and generally it is rather presumed to be *homicidium culpsum*, than *dolosum & prameditatum*, *nam nunquam praesumitur dolus.*

By our Law, Slaughter and Murder did of old differ, as *homicidium simplex & prameditatum*, in the Civil Law; and Murder only committed, as we call it,

it, upon *fore-thought felony*, was only properly called Murder, and punished as such, *K. Ja. Par. 3. cap. 1.* where it is Statute, that Murder is to be capitally punished: but *Chaudmella*, or Slaughter committed upon suddenly, shall only be punishable according to the old Laws, *vid. Aſſ. 95. 96. Par. 6. Ja. 1. & 22. Par. 4. Ja. 5. & 35. Par. 5. Ja. 3. & Aſſ. 31. Par. 6. 2. M.* The old Laws to which these Acts relate, are Statute *William c. 5. Stat. Alexander c. 6. Stat. Rob. 2. c. 9.* in which it is declared, that Murderers who are guilty of fore-thought felony, shall not have the privilege and advantage of refuge in the Girth: but that such as are guilty of *Chaudmella*, or casual Slaughter shall be sheltered in the Girth. Yet I find that none of these are in any other old Statute, to determine punishment of casual Slaughter, but that it was not punishable as Murder; is clear by the opposition. And in all our Laws, betwixt single Slaughter, and fore-thought-felony: all casual Slaughter was of old comprheended under the word *Chaudmella*, which is a French word: *Chaud* signifying Hot, and *Mesler* signifying to mix. But in effect, this *Mellestum* answers properly to *rixa & homicidium, in rixa commissum*, which is but one species, *homicidium non dolesi.*

XII. By the late 22. *Aſſ. Parl. 1. Ch. 2. Seſſ. 1.* It is Statute, that casual Homicide, Homicide committed in self-defence, and Homicide committed upon Thieves, shall not be punished by death. And seing this Act mentions not Homicide, committed in *rixa* or *homicidium culposum*: and seing *homicidium culposum* differs from casual Homicide; it may be doubted, if under the one, the other may be comprehended: and it may be urged, that casual Homicide is in this Act a general term, comprehending all Homicide, which is not committed by fore-thought-felony, because what is not designed is casual, and what is not fore-thought is casual: and the Doctors do use the Word Casual oftentimes in this general sense; as is clear by *Gothofred prax. crim. hoc tit.* And by the rubrick of this Act which bears an Act concerning the several degrees of casual Homicide. It appears that the word Casual, is taken there in a Lax Signification: albeit I confess, that the inscription is most improper; seing Homicide in self-defence, and Homicide committed upon Robbers, are not Species of casual Homicide: but whether Homicide in *rixa* be comprehended under that Act, was controverted in *William Douglass* case: and by that decision it is clear, that in our Law, though Murder was not as first designed: yet if it was designed the time the stroak was given, the killer is guilty of Murder: that premeditation is requisite to make Murder Capital, being only such as *antecedit actum licet non congressum.*

The Civilians in the case of *Homicidium per plures commissum*, state three questions; The first is, where the Murder was committed upon fore-thought felony, and then indefinitely, all the assisters are punishable by death. The second is, when it is not certain, but it is only suspected, and presumeable that it was deliberately committed, and then all may be tortured; but if they deny the design, they are all only punishable by an arbitrary punishment, because of the uncertainty. The third is, when the murder was certainly committed, in *rixa*, or *tuilzie*; and then either the Author of the Pley is certainly known and he is punishable by death, in the rigour of the Lavv, albeit many Lavvyers are positive, that no Countrey uses this rigour; I remember that in *William Douglass*'s case, this was urged: for there several Gentle-men having made a quarrel; which was only proved by one witness, they went to the Fields of *Lieth*, and *Hoom of Eccles*, was killed; but it was not proved who was the killer: and the quarrel was only proved by one witness; who likewise proved that *Spot* had the quarrel with *Eccles*, and that *William Douglass* had none; and yet the Assize found *William* guilty, and he thereupon died because present.



XIII. Homicide likewise committed upon Thieves, and Robbers, breaking Houses in the night, or committed in time of masterful Depredations, are free from punishment, by the foresaid Act 22. And albeit it be declared lawful to the Justices, to fine such as are assilzied from Murder, upon the Defences of casual Homicide, and Homicide in defence: yet such as kill Robbers, or Night Thieves, are free from all arbitrary punishment. By this Act likewise, it is lawful to kill such as assist, or defend the Depredators, or oppose their Pursuit by force; and by the 6. Act of the second Session of that Parliament, it is Statuted, that the Parties whose Goods are robbed, shall acquaint the Sheriff, or Justices of Peace of the Paroch, who shal require all Parties to concur; and if any of the Concurrers, kill any of the Robbers, they are declared free; upon which it may be doubted, if such as kill Robbers without acquainting the Sheriff, or Justices of Peace, are punishable: And it seems they are, seing this Act explains the other, and modifies somewhat the indefinite Power given to privat Persons, who upon pretence of such Inventions which might prove very dangerous: And therefore the last did wisely require the concurrence of the Magistrat; and upon this consideration, I know that it was consulted, that notwithstanding of this, such as had not acquainted the Sheriff, or Justices, could not be exculpat. And yet it may be argued, that this Act narrates not the other, nor bears expressly a Rectification of it; but, without lessening the priviledge therein granted, adds a new one, and so being introduced in favours of Possessors, should not be interpret to their disadvantage. By the Civil law, *licebat nocturnum furem occidere*. And by the 227. *Ad. 14. Par. Ja. 6.* It is declared lawful for the Leidges to convene, and execute Thieves, and they are all made Justices for that effect; upon which Act, a Defence was proponed, for the Inhabitants of *Kintail*, who took a Robber, and execute him by their own Authority, and a formal Court. But by the Civil Law, and Doctors, it was not lawful, *furem vel pradam diurnum occidere*, except the thing stolen was of great Value, and could not be otherwise recovered; or that he defended himself, and resisting his being apprehended: All which Defences may be proved, by the assertion of the Killer, *Farin. 125. part. 4.* And if any other Probation were requisite, the Benefit of these Acts were a Snare, rather than an Advantage; and Necessity legitimates many things, which were otherwise hard.

XIV. By the Civil Law, it was lawful for the Father to kill his own Daughter, if he found her committing Adultery, and to kill also her Adulterer. *l. part. 1. ff. de Adult.* which was allowed rather in hatred to Adultery, than because the Law considered it was too hard for a Father to restrain his passion in that case; for if it had been allowed to the Father only upon this last accompt, it had been allowed much more to the Husband to kill his Wife, if he found her committing Adultery; for his Relation being nearer, and his honour more concerned than the Fathers, his Passion behoved to be also more violent; and yet the Law being jealous of the Husbands violence, does only allow the Husband to kill the Adulterer, if he be a mean person, but if the Adulterer be a person of quality, or if the Adulterer be found else where than in the Husbands own House, it is not lawful to kill them, for the injury is heightened by polluting the Husbands own House, and becomes a kind of Adulterous-Hamfucken: And yet if the Husband kill in either of these cases, that Law ordained the Husband only to be punished by some arbitrary punishment, but not by death, *l. Marito. ff. de adulter.* But this last Determination doth not satisfie Justice, for it seems reasonable that it should be rather lawful to kill a person of quality, committing adultery, than a mean person, both because Adultery is more ordinar amongst them, as having more ease, and being more luxuriously fed, and because the Husband cannot be so easily presumed to have had former quarrels

with a person above his rank, & so should be believed to have killed him meerly to satisfy his just revenge. As also since they can sooner prevail, they ought to be more rigidly punished. The Law has deny'd this priviledge to Women, who may not kill their Daughters or Husbands, the reason whereof I conceive to have been, that the Law considered, that Husbands were more prejudged than the Wives, by the Adultery, since thereby, not only was their Bed defiled, but their Estate carried away to another mans Children, or else it thought women too passionat to be intrusted with such a License, or that it was undecent to allow women the use of Arms: And yet I believe their just grief would secure them against the ordinary punishment; and though some prerogative be due to the Man over his Wife, but non *è contra*, yet Women may complain that men being the only Legislators, have taken too great a measure of favour to themselves in this Law. I have not observed any Decision of this in our Law, and since our Statutes have secured Murderers in other cases, as in Self-defence, killing of Thieves, &c. And yet have not priviledged this case it may be seen that the Husband, nor Father cannot kill by our Law, and the most that they could expect, were, that after they were found guilty by the Law, the Council might either change the doom of Death into an arbitrary punishment, or might recommend the party to His Majestys Clemency for a remission. But it were it hard to punish with death amongst us, what almost all Nations allow as lawful, and what may be yet a further Check to that growing vice. And this seems juster than to allow with the Civill Law, that the Husband or Father, who are persons interess'd, should be Judges in their own concern, and should be Judges when they are in passion, and because they are in passion; Nor can I see why the Law should punish even him who possesses by his own authority what is truly his own, and yet should allow here the Parties interess'd to punish with death by their own authority: or that Passion which only infers mitigation of the pain else where, should here infer absolute impunity, for this were to make one irregular Act legitimat another, since passion is a Transgression against Reason, as Adultery is against Law: But since this indulgence is personal and only granted to the Father and Husband, because of their just Passion and near Relation, it is not reasonable that it should be extended to such as kill by the Fathers or Husbands Command, which Command none ought to obey, being contrair to Law: Nor ought this indulgence to extend to the Father or Husband when they kill *ex intervallo*, and not when they find the Committers in the very Transgression, for the Law allows no passion to continue, and therefore whatever Revenge is allowed to it, is only allowed if it be executed immediatly, & *ex incontinenti*. And though in Civil cases that is said to be done *ex incontinenti*, or immediatly, which is done before the doer go about any thing else: Yet I conceive that Interpretation would be too lax in this case, and that the killer could not plead this priviledge, except he killed them in the very Act, or rising from it.

XV. *Homicidium deliberatum*, or upon fore-thought Felony, is still punishable by Death and Confiscation of the Moveables of the Defunct for his *Majesties* use, *Stat. Rob. 3. cap. 43.* And albeit Lawyers say, that it is still rather presumable to be casual, than deliberat, and that by our Law and Custom, design is still libell'd, yet because it is impossible to prove design, which is a secret Act of the mind; all killing is always punishable by death, except some of the qualities of chance, self-defence, &c. be alledged upon by the Pannel. It may be here asked, if by our Law, he who stricks with his Fift, or a Batton (which are of themselves no mortal weapons) be punishable by death, tho' the Party struck there by him die: And it would seem hard that he should, seeing no design to kill can be here presumed, & *maleficia voluntas & affectus distinguunt*; and by the 5. *Cap. Will. Reg. num. 4.* It is said that *si quis interficiat cum pugno dabit*

*dabit regi 25. vaccas, & satisfaciet parentela defuncti secundum assisam regni*, by which it would appear, that striking with the Fist is not capital, albeit death follow

Murder premeditated, may be divided into that species which is simply such, Assassination, Murder under trust, and self Murder.

XVI. Murder under trust, is, with us, when a Party who put himself under the assurance and trust of another, is murdered by him : and this is by a special Statute punished as Treason, Act 51. P. 11. Ja. 6. The Words are, (where the Party slain is under the *Traist, Credit, Assurance, and power of the Slayer*; the Party being tryed and found guilty thereof by an Assize, it shall be Treason, and the person found culpable, shall forfeit Life, Lands and Goods; what this Credit and Assurance is, hath oft been questioned, and it is reported that the Origin of this, was to punish the Murder of a Gentleman, who invited his Neighbour to a Feast, and killed him and all his Relations in his own House : So that Invitation is one Branch of this Trust ; 2. Assurance signifies, that when two persons were at fead, and the one hath found Borrowes to one another, Act 97. Ja. 1. p. 6. 3. Where persons at variatice are under Capirulation. 4. This Act has been stretcht to the conjugal Trust betwixt Man and Wife, anno 1627. *Andrew Row* ; And yet in the Process intended against *Swintoun*, for killing his Wife, Anno 1666. It being objected that this Act extended not to such Trusts as this, the Pursuer restricted his Libel to Murder. And the Lords of Session, Anno 1665. found that a Sons killing his own Mother, was not a Murder under Trust, punishable by this Act : And yet it would appear, that both killing of Wives and Children falls under that Branch of the Act, where the Party is under the power of the Slayer. This species of Murder was by the *Civilians* called *proditio*, which is designed to be *homicidium sub pretezu amicitie, v. g. dum federem tecum in Mensa vel amicitiam fingerem*, which is punishable by a more severe death than ordinar Murders. And in *Spain*, the Betrayer or Proditor ( for even in propriety of Speech, Murder under Trust is Treachery, or Treason ) *trahitur ad caudam equi & postea furca suspenditur*, Gomez.

By that Act likewise, Tryal should be taken by an Assize ; And therefore the Lords found, that though *Mr. James Oliphant* had been guilty of killing his Mother, and that it had been Treason, yet his Forefaulture could not fall to the King, upon a simple Denunciation for not appearing to undeuly the Law, because a Tryal is requisite in this case. And by the 137. Act. 13. Parl. Ja. 6. The killing any person in the Parliament-house, during the sitting thereof, or the Inner Tolbooth ( *id est*, the Inner-house of the Session ) during the sitting thereof, or the Council-house whilst the Lords sit, or kill any in the Kings Chamber, Cabinet, or Chamber of Peace, or in the Kings presence any where, infers the pain of Treason.

XVII. What is interpret to be Art and Part of Murder, can hardly be defined, for it does depend upon the Assize : A design to Murder, though no Murder follow, *affectus sine effectu* punitur capitaliter, l. 1. *is qui cum telo*, C. *Corn. de Sicar* : yet by the Custom of Nations, the punishment now reaches not Life, *Clar. hoc tit. num. 74.* and I find that *Matthew Stuart*, being pursued for contriving the Death of *Thomas Kennedie*, came in the Kings Will, and was only banisht, *Mart. 1597.* As also I find, that though *Lawson* was cleansed of the Murder of her own Child, yet she being referred, to the Justices, because of the violent Presumptions adduced against her, and that she her self had confest she bore a dead Child ; the Justices therefore did ordain her to be Whipt and Banisht, 20. August 1662. and *Margaret Ramsay* having confest that she bore a dead Child, and was advised to cast it into the *North-Loch*, which she did not, though without her knowledge it was done by others; the Justices, though she was assoilzied by the Inquest, ordained her to be Scourged and Banisht, 1661.



XVIII. Though such as kill in prosecution of Law, are not punishable as Murderers, yet if they exceed, they are punishable, not only *quoad excessum*, arbitrarily, but even *panâ ordinariâ*, as Murderers. An instance whereof vvas decided, the 14. of June 1672. in the person of Mr *Archibald Beath*, vvhoe being pannelled for killing *Allan Gardiner*, alledged that the Council had by their Act and Proclamation, ordained all Meal brought from *Ireland* to be seiz'd upon, and the Boats wherein it was brought, to be sunk, in prosecution whereof *Gardiners* Meal being seiz'd, he broke the Seizure, and being followed in a Boat, by the said Mr. *Archibald*, and others, he was commanded to stay his Boat, but was so far from obeying, though commanded in his Majesties Name, that he had almost run down the Pannels little Boat, who was thereupon forced to shoot at them, and though this Act, *ex post facto*, degenerat into an act of killing, yet no killing was at first intended; and the rise of all such Actions is to be first considered.

To which it was replied, that this Act was to be understood *civiliter*, and did only impower the Ledges to Seize, but not to kill, and all Mandats are to be so interpreted, as not to be extended, *ad ea quæ mandans in specie non mandasset*, or *quæ solitus est mandare si aliquando mandat non mandat nisi certa forma servata*, but it cannot be subsumed that the Council would have allowed the Importer of such Victual, to be killed, nor do they use to intrust the Execution of such Laws to Ministers; and if they had designed that the execution of this Prohibition, should reach death, they would have expressly allow'd the Seizers to kill, as they use to do in such cases. To which it was duply'd, that though the Minister was not obliged to concur because of his Function, yet concurring as a Subject, he is not punishable therefore capitally; and if a Minister should concur when the *Huy and Cry* were raised after a night Thief, or if a Minister did assist such as pursued Rebels, and should kill in the Pursuite, it were absurd to conclude that he should be punisht as a Murderer, because he was not obliged to kill: And it is not imaginable, but if it had been proposed to the Council what Seizers should do, in case of resistance, but they would have authorized them to kill; nor could their Act receive compleat obedience in case of resistance, for else such as resolve to contraveen, might secure themselves by their resistance, and the Council by empowering to sink the Boat where the Victual is, does very clearly impower the killing of such as resist, for they might have been sunk in the Boat, and he who is allowed to sink a Boat, is allowed to sink all who are in it. Notwithstanding of which Defences, the said Mr. *Archibald* was put to the Knowledge of an Inquest, and after the Verdict was ordain'd to lose his Head, but the Parliament having thereafter that same month allowed by their Act, such as resisted to be killed, the said Mr. *Archibald* was thereupon remitted as to the Crime, but was never readmitted to his Church.

Some *Militia* Soldiers also being pursued for Murder, 3. Febr. 1674. alledged that they could not go to the knowledge of an inquest as Murderers, since if they killed, it was in prosecution of their Officers orders, for they being sent to Poynd, were resisted; and though it was reply'd, that opposition to the poynding could not warrand killing, but they might have pursued a riot: This was alledged not to be relevant, because, *sibi imputent*, who opposed, and the Soldiers must do effectually what is commanded: and their Officers may shoot them if they return without effectuating what was commanded, and military commands must not be delayed, nor opposed, like other commands. Notwithstanding of vvhich debate they were found guilty.

XIX. It is much controverted amongst the Doctors, whether it be lawful, *occidere bannitum*, a person at the Horn, and by the Civil Law, *non li-*

cet

et Bart in l. ut vim. N. 1. ff. de just. & jure, but by the Statutes of particular places, they all conclude, it may be lawful, *ob quietem publicam*: and by our old Decisions, that the killing of such as are at the Horn for Slaughter, or other Crimes, is not Criminal, January 1600, *Guthrie contra Jarden*: but by the foresaid 22. *Act Par. 1. Ch. 2.* It is declared, that the killing such as are denounced, or declared Rebels, for Capital Crimes, or such as defend these Rebels, may be lawfully killed; whereby it is implied, that such as are at the Horn for other Crimes, may not be killed; and such could not be lawfully killed, who are only at the Horn for Pecunial Causes, and any Statute allowing to kill such, would be null, *Clar. hoc tit. num. 53.* But it may be here doubted, what are these Criminal Causes, for which one at the Horn may be killed? for clearing whereof, it is fit to remember, that the Doctors allow only such to be killed, who are *banniti ob grave delictum*, *Clar. num. 53.* and in reason, it should be such a Crime, for which the Rebel hath deserved Death, if he had appeared; for it seems rigid and unjust, that wherever the conclusion of the Summons was Criminal, the Party being Denounced, may be killed; or that when ever the Rebel was Denounced for Absence from a Justice Court, he may be killed, seeing the Common-good, which is the reason inductive of this Law, does not require, nor in effect is not consistent with this interpretation. 2. It may be doubted, if he who kills a Rebel for privat Revenge, and not *ob vindictam publicam*, vwill have the benefite of this Defence: of this we have an instance, anno 1600. Where Robert Auchmonty being pursued for the Slaughter of James VVauchop, it was alledged that the Defunct was at the Horn, for receipting a Traitor; To which it was replied, that the Pannel killed him upon a privat quarrel, for having conversed with the Defunct long alter he vvas at the Horn, for that cause: but that he killed him in a Duel, upon a privat quarrel: in respect vwhereof, the Pannels defence vvas repelled, and he put to the knowledge of an Inquest, and thereafter beheaded. And yet I find the Doctors of opinion, that *bannito occiso per inimicum occidens non reputatur homicida*, and which is more, he will not have right to the reward promised for killing the Rebel. *Carvet in Prag. 1. de exul. num. 134.* and enemies are these who most probably will execute this publick Justice, which the Law designs. And seeing our late Act makes no distinction betwixt such as kill upon publick and private revenge; I believe that the case now hath no difficulty, and that now the killer in both cases would be free from Punishment. Yet I think, that he who would kill a Rebel in a Combat, might yet be Pannelled, for contraveening that Act anent Duels; for though he might lawfully kill a Rebel, yet he could not lawfully fight a Duel. 3. It may be doubted, if he who was Denounced Rebel, was not lawfully Denounced, v. g. if he was out of the Countrey the time of the Charge, or that the Execution was not stamped, or wanted some Solemnity, if *eo casu*, the killer would be guilty of Murder: which Defence, I find likewise propon'd in the former case, and yet repelled, and very justly, for a privat person is not obliged to know these nullities. If any man resist the execution of his Majesties Laws, by Messengers, or other publick Servants, in that case, the Messenger cannot proceed to kill, as was found in *John Mackintoshes* case, May 11. 1673. But if the resister do also proceed, to offer violence, by drawing upon the Messenger, in that case the Messenger may kill him lawfully, without necessity of proving that he would have been in danger of his life, if he had not killed; though privat persons cannot kill when they are invaded, except they be by that invasion put in danger of their life.

XX. Albeit ordinarily death, and the confiscation of Moveables, is the punishment of Murder; and that the Life-rent of the Murderer doth not thereby

thereby fall ; yet in some cases, the Life-rent falls, as by the 118 *Aff* 12. *Par.* 7a. 6. These who are denounced Rebels, for slaying men in the Church, or Church-yard, in the time of Prayer, Preaching, or administration of the Sacraments, their Life-rents presently falls to the King ( though *regulariter* Life-rent Escheats fall to the respective Superior, and the receipters do likewise lose their Life-rent Escheats; declarator being first past upon the receipt. It may be here doubted, if these words, *the time of Divine Service*, may extend to slaughters, committed the time of Preaching, &c. Albeit there be no Preaching, or Prayer for the time there: the reason of the doubt is, seing the 39. *Aff* of the 6. *Par.* 2. M. anent removing, is so interpret: for by that *Aff*, vvarning of Tennents should be used at the Paroch Church, the time of Preaching or Prayer: vvhich Words are thus interpret, the time that Preaching uses to be, though there be none at the time.

By the 219. *Aff.* *Par.* 7a. 6. If either the Pursuer or the Defender in civil pursuits, kill one another, during the Dependence, *eo casu*, the killer being put to the Horn, either for not compearance at the Dyet, or for not finding Caution, he losses his Life-rent Escheat immediatly upon the Denunciati-on.

XXI. Murder is one of the four Plea's of the Crown, *Malcol.* 2. c. 11. and therefore the cognition thereof belongs to the Justices; and Commissions cannot be granted for tryal thereof, *Aff.* 74. 7a. 6. *Par.* 11. albeit it be now most ordinar, to grant such Commissions: and yet this Act being alleadged against one of those Commissioners, before the Council, they did recall the same: but if the Murderer be taken *red hand*, he may be judged by a Barron (having power of Pit and Gallows) by a Sheriff, or any other Judge ordinar; betwixt which there is likewise this difference, that Murder is Bailable, 7a. 3. *Par.* 6. c. 42. But Slaughter taken red hand, is not Bailable; but the committer thereof should be judged within that Sun, 7a. 1. *Par.* 6. c. 89. 95. And if the Barron or Sheriff proceeded not within that time, the Cognition belongs only to the Justices, for they are Judges to Murder upon citation.

XXII. By several old Acts, I find that the Sheriff, when a Murder is committed, may raise the Kings Horn (*id est*, the hue and cry, *hoefsum*, as the Latine translation calls it) upon the Murder, and follow him out of his Sherifdom, and send Letters to the next, and he to a third, and so till he be taken, & that when he is taken, Justice should be done upon him, within forty days, and that he should be sent from Sheriff to Sheriff, to the place where the Crime vvas committed, vvhich is novv obsolet; for if he be not taken red hand, the Sheriff cannot proceed against him; albeit it vould appear that he may, if he be taken vwithin forty dayes, 7a. 1. *Par.* 6. c. 89. vvhich I find no vvhether abrogated, nor any thing to the contrair, except only *Hops* assertion, in his lesser Practiques, and that may be interpret also Cognitions, after the forty dayes are expired.

By the 50. *Aff.* of the 6. *Par.* 7a. 1. It is Statuted, that Sheriffs in the former case, may proclaim the Murderer fugitive, and forbid all the Liedges to receipt him, under the pain of losing Life and Goods; but this povver is also obsolet. And the receipting Murderers seems not any accession, except other presumptions be adduced, as if the Murder vvas committed upon the receipters account: in vvhich case, receipting, may be arbitralily punisht, but of this, I find no formal Decision, only the Registers mention, that *Thomas Brice*, being accused for receipting his own Son, who had Murdered *Fairhope*: it was alleadged, that the receipting his own Son could be no Crime, *nam proximitas sanguinis tollit presumptionem criminis hoc casu* *Clar. quest.* 110. num. 54. *l.* 2. 2. ff. de recept. And receipt could only be interpret to be

a Crime



a Crime, in our Law, after the committers are Denounced, and Letters of intercommuning obtained against them: which defence was thought so relevant that the Justices demur'd upon it, but this received no Decision..

XXIII. When a man is killed by fore-thought felony, the King can by our Law grant no remission for the Murder, *Ja. 4. Par. 6. cap. 63.* and *Ja. 6. cap. 13. 169.* But yet Remissions are daily granted, for such Murderers, and are admitted in the Justice Court, notwithstanding of this objection, as in the Earl of Caithnes case, in *anno 1668.* And it is alledged, that these Acts are by the Stile, but temporary Acts. But all such Remissions are null, except the offender offer to Assist the Party: which Assitment is modified by the Council, and the Party cannot propone upon his Remission, till he find present Caution, to satisfy what shall be modified, within forty dayes, or else he must during these forty days. go to Prison, and if payment be not made within forty dayes, his Remission is null, *Ja. 2. Par. 14. cap. 75.*

*Assassinii crimen*, or to kill a man by Assassination, is to Murder a man for Money; and this Species was introduced, first, by the Canon Law, *cap. 1. de homicid. cap. 6.* and had its name from the *Assassini*, who were a Tribe of the Phœnicians; and who said themselves to be Christians, being truly Mahumetans, that they might kill Christians; and therefore, and because the fore-said Canon speaks only of Christians, it is still concluded, that only such as kill Christians, are to be reputed Assassins; and the killer of a Jew was found no Assassin, *Caval. h. t. num. 475.* And yet *Matheu* thinks, that all killing for Money, is Assassination; for this Crime being founded upon Nature, to kill a Jew is as far against nature, as to kill a Christian. And it is a greater scandal upon our Religion, to kill a Jew, because it reproaches us among Infidels.

The Specialities introduced in this Crime, are, that the endeavour to kill for Money, is a Crime, though death follow not: and that Assassination may be proved, by presumptions; and that they cannot enjoy the benefite of a Sanctuary, or Girth, *Cabal. num. 501. 515. 526.* And though the fore-said Canon run only against such, as undertake to kill for money, yet the Conducers, or such as intreat them to kill, are also Assassins, *Gomez. 3. resol. 3. num. 10 Math. pag. 521.* But these are not in observance with us, except as to the privileged of a Sanctuary: from which, all such as committed Murder under Trust, or *per insidias* (which that Act calls *Assassinium* only) are expressly excluded, *Act. 35. Parl. 5. Ja. 3.*

## TITLE XII.

### Of Duels.

- 1<sup>st</sup> *The several Kinds of Duels, allowed of old by other Nations.*
- 2<sup>d</sup> *What Duels were allowed of old in Scotland.*
- 3<sup>d</sup> *How the giving and receiving Challenges is punishable, though no Combat follow.*
- 4<sup>th</sup> *The way of Libelling used in this case.*
- 5<sup>th</sup> *Whether Duels for reparation of Honour, be lawful, where no other Reparation can be had.*
- 6<sup>th</sup> *What must be proved in this Crime.*
- 7<sup>th</sup> *Whether he be not punishable who kills in a Rancounter only, or he who tells the Provoker that he is going to such a place.*
- 8<sup>th</sup> *The punishment of Duels, and who are accounted Art and Part.*

**D**uels are but illustrious and honourable Murders. And therefore I have subjoyned this Title to the Title of Homicide : This is that impetuous Crime, which triumphs over both publick Revenge, and privat Vertue, and tramples proudly upon both the Law of the Nation, and the Life of our Enemy. Courage thinks Law here to be but Pedantie, and Honour persuades men, that Obedience here is Cowardliness.

1. We find no such Crime as this among the *Romans*, because that wise Nation employed their Lives against their Enemies, and not against their fellow-Citizens : And the true Tryal of Courage among them, was fighting against the Enemies of *Rome*.

Duels are either Judicial or Extrajudicial : Judicial Duels were these which were allowed by Law, for trying the innocency of such as wanted other legal Probations.

The *Longobards* first did allow this way of Duelling, by publick Authority, who did regulat it by twenty several Determinations : And thereafter it was renewed by *Philip the fair*, King of *France*, Anno 1360. but was bounded with these four Conditions. 1. That it should only be allowed in Criminal and Capital Cases. 2. That it should only be allowed in Crimes treacherously committed, where the Truth could not be otherways found out. 3. Where there did lye strong presumptions against the persons provoked. 4. Where it was certain there was such a Crime committed against the provoker.

II. With us in *Scotland*, Duels were allowed not only for clearing of innocence, as to Crimes, but likewise in civil cases, as when an Heir denyed that his predecessor granted a Conjunct-fie *R.M. lib. 2. cap. 16. v. 47.* And when any thing was denyed to be lawfully bought by the owner, *Lib. 3. cap. 13. v. 4.* But thereafter I find that by the 16. cap. Stat. Rob. 3. All duels are discharged, except in the former four cases allowed by *Philip the fair*. The solemnity of Cartels used in such cases, was the casting of *Gloves* to one another, as is clear by *Skeen ad cap. 24. v. 9. R.M. Duelliones in hoc regno hinc inde chirothecas offerunt*, which custom had its origine from the *Longobard* Law above cited, as is clear by *Long. de duel. and Dumband. tit. eod.* The place appointed by our Law for such Duels, was the Bridge of *Stirling*. cap. 28. Stat. David. 2. And if the ap-  
pealer

pealer in ordinary Crimes was foil'd and worsted his pledges payed the King nine Cows and a Colpindach, and satisfied for the Calumny, *Stat. Alex. cap. 11.* But in Treason the appealer being vvorsted came in the Kings vvill, and the party appealed, being vvorsted, vvvas disherished. *R. M. L. 4. c. 1.* But these Duels are discharged by the Canon Lavv. *cap. monomachia. 2. quest. 4. & cap. ultim. Ext. de purg. vulg.* though vvith us such judicial Combats, by authority, are not absolutely discharged, for, by the 12. *cap. 16. Parl. Ja. 6.* Wherein singular Combats are discharged, there is an exception made of such as are fought vvith His Highness licence.

III. Duels undertaken without publick authority, are thought by many Lawyers, to be lawful, when undertaken by a person who is injured in his honour, if the party injured cannot be otherways repaired; either because there is not a judge in the place, or else the injurer will not appear before him, or though hecompear, the Judges refuses to do Justice, *ubi enim deficit jus ibi saplet ensis & propria ultio. Bart. in L. hostes num. 9. ff. de cap. & possin. revers.* And many are of opinion that these privat Combats are lawful, for defence of our honour, and as we may defend our life by taking that of our Neighbours, so we may defend our honour by the hazard of his life.

But that Duels are in themselves unlawful by all Law, appears very clearly from these reasons,

1. That the Law has justly thought fit, that the Magistrat only should do justice to all, and that no private man should revenge himself; for in so far he commits Treason, in assuming the power of the Civil Magistrat. 2. The power of taking and using Arms, belongs only to the Common-wealth, and consequently no privat man should run to Arms, upon an imagination that he is wronged in his honour. 3. There is no proportion betwixt the injury and reparation, in such cases a verbal injury being too severely punished, when punished by death, there being no proportion betwixt what may be helped, and what may not. 4. Revenge belonging to GOD, it is an usurping of his povver. It is the destroying that body which is the Temple of GOD, the defacing of his image ( whereas to deface even a Princes Image, designedly is Treason ) and it is a spilling of that blood for which Christ shed his. 5. It is a Crime against a mans self, and is in effect self-murder: Nor need those who resolve to kill themselves, take a base way, since this honourable way is easy and patent, for he may soon make quarrels, and so kill constantly till he be killed.

It is a Crime against the Common-wealth, because it destroys its subjects, and makes the hateful sin of Murder a desireable effect of Glory. It is likewise a great offence against our friends, since it draws them, though innocent, into the same snare, as seconds, assisters, and revengers: and it is dishonourable, because it wrongs a mans Wife, by making her miserable, and notwithstanding of his many Obligations to her. 6. It is an unjust Decision of controversies, since strength, skill, or accident, prevail oftentimes against honour and innocence, so that this trial should neither be allowed by justice, nor honour: and therefore *Augustus* being provoked by *Anthony*, did nobly answer, that if *Anthony* was weary of his Life, he might take any other way to dispatch himself. And *Sertorius* being provoked by *Metellus*, answered, it was below a General to dyelike a common Souldier: And therefore it may be answered to the contrary arguments, that it is to be presumed the Magistrat vvill do Justice in repairing the same of him vvho is vvronged, nor can a Duel restore the same that is lost; for a Duel shevvs only a man to be resolute, or desperat, vvithout being innocent, or generous: and it is more presumable, that the provoker vvvas justly defamed, and finding himself unable to survive the shame, resolves to dispatch himself by this plausible vvay of self-murder, nor can a man



take a more easy way of publishing that where he was defamed, than by killing the defamer, whereby he will both bring himself and the occasion of that accident into the mouths of the World. Though that Act discharge only singular Combats: And that the Word *singular Combat* is properly only applicable to the fighting of two single persons, which is only properly called *singulare certamen* yet this *singulare certamen*, or *singular Combat* is properly enough extended where more fight on a side. *Cagnol. in l. Favorabiliores 86. ff. de reg. jur.*

V. Since fighting of singular Combats is only declared punishable, therefore the giving or receiving Challenges is not punishable by Death, though even that be likewise punishable by the Council, *Arbitrariè*, as tending to disturb the peace; but since the very fighting is declared punishable by Death, it follows necessarily, that such as fight Combats, are punishable by Death, though neither party be killed: And if only killing had been punishable by Death, this Act had been unnecessary, since that was punishable as Murder before this Act.

VI. If any person be killed, the libel is founded both upon the Acts against Murder, and this Act against Duels. But the difference betwixt the way of Libelling is this; that if the Libel be only founded upon the Acts against Murder, then Self-defence is receivable by way of exculpation to elude this Libel, because Self-defence there, is not contrair to any quality of the Libel, which must be expressly proved, for the quality of fore-thought felony must necessarily be libelled in Murder. Yet it needs not be proved, and so the probation of the Defence and Libel, are not contrary. whereas in Duels an express provocation must be libelled and proved, and so the probation of the Libel, and Defence would be contrary, as was found in the case of *Mackie*, in June 1670. where it was likewise found that a challenge given and accepted, did infer a Duel, and it was not sufficient, that the party provoked, coming thereafter to the field, was set upon, and put in hazard of his Life by the provoker; for though *primus insultus*, be sufficient to defend against fore-thought felony in other cases, yet where there proceeded a provocation, it is not sufficient, because he who was provoked by going to the place, *versabatur in illicito*, and so should not have the benefit of Self-defence. And if this were allowed, the party provoked might easily elude this statute, because he might accept the challenge: And yet when he is upon the place, refuse to fight, until he were set upon by the other, and put even in hazard of his life by him, which method being followed by one *Robertson*, a Souldier in *Linlithgow's* Regiment, he was notwithstanding found guilty of Murder, in July 1673.

VII. From this it appears likewise that such as in answer to challenges, do declare, that they will be in such a place at such a time, and if the provoker attaque, they will defend themselves, they fall within the compass of this Act, since by declining a formal answer, they design to cheat the Law, for by assigning place and time, they in effect accept of the challenge; and this can neither be called a meer rancounter, nor Self-defence, as is most justly debated by *Voet. de duel. cap. 33. quest. 1.* but if any man getting a challenge, shall answer, that he will not transgress the Law, but if the challenger shall attaque him, he will defend himself, if this person thereafter, in defence kill, he will not be punishable by this Act, for Self-defence does not leave off to be a legal defence, because the person attacked promises he will defend himself.

VIII. Both the provoker and the provoked, killing, are by this Act not only punishable with Death, but by confiscation of their Moveables, and the provoker is declared lyable to such arbitrary punishments as his Majesty shall think fit, because his guilt is greatest, for the party provoked hath still his guilt lessened with a shadow of Self-defence.

Not only are Seconds art and part, but even those who carried the challenge, though

though they were no Seconds : and yet it may be alledged, that these cannot be punished with Death, except they were present, since the carrying a challenge is but an incomplete Act, & *nudus conatus*. But yet it may be answered that if Death follow upon a Combat, wherein they carried the challenge they are punishable as murderers, since the Crime was compleated by their complices. In June 1676. David Hamilton was found guilty, though it was alledged that albeit he had come to seek the length of his gear who was to fight with his Son, yet that was done but upon design to terrifie the other to fight, as appears, not only by the strangeness of the expression, but because he did tear the challenge, how soon ever he got it in his hands : and albeit it vvas proved that he did trip up the Mans heels, who was fighting with his Son, yet that vvas done meerly to end the Combat, he having taken his ovvn Son in his arms immediatly thereafter.

In this case it was likewise alledged, that those who were adduced witnesses could not be received, because they had come out of the house with the other party to the field ; and being very many in number, they might have stopt the Combat, if they had pleased : notwithstanding of which objection, they were received. But I conceive, that since all men are obliged, as far as in them lyes to keep the peace, and hinder Crimes it seems very reasonable that if many who might hinder, do tamely look on, without offering to redd or separat the parties, they should be punished: and this should hold not only in any of the Kings officers who are present, or in any who are commanded by them whom *Co-koblerves*, to be fineable, pag. 158. but even in all who are present, tho the Punishment, as to them, should be lesse, than as to the others, *idem est facere, & nolle prohibere cum possis : & qui non prohibet cum prohibere possit in culpa est.*

## TITLE XIII.

### Self murder.

- 1 Despair, nor Stoicism, cannot defend against Self-murder.
- 2 Furyosity does defend.
- 3 An Endeavour to commit Self-murder, is punishable.
- 4 Self-murder may be committed by Omission, as well as Commission.
- 5 What Declarator is to be pursued by the Donators, of the Self-Murderers Escheat, and how it is to be proved.

I. **G**OD Almighty has placed every Man at his Post here, and he vvho violently tears himself from it, deserves much vvorse, and is more guilty than a Souldier, vvho deserts his Station : And since Princes punish as Criminals, such as kill their Subjects ; much more may the Almighty punish him vvho kills himself ; for he vvho kills himself, kills Gods Subject ; and therefore, *Nemo est dominus suorum Membrorum*. The Law likewise considers him vvho vvould kill himself, as one vvho vvould spare none else, and condemns an Humour vvwhich is so dangerous.

Upon these Reasons, but especially, because God hath forbid Man to kill, vvithout making a Distinction of killing our selves, or others ; all Christian Nations punish severely Self-Murder, as Murder ; for they confiscat their Moveables, and deny them Christian Burials : to which some Nations, for a further Mark of Ignominy, add the hanging them upon Gibbets : but this last, our Nation uses not.

This Crime was called *αυτοκτονία* by the Greeks, and it was condemned by Plato, l. 9. de leg. and was at first punished by the Heathens, — Virgil lib.

6. *Æneid.* speaking of Hell, *proxima deinde tenent mæsti loca, qui sibi latibum*  
*Insontes peperere manulumenq; perossi Projecere animas:* the English call him,  
 felo de se.

The Stoicks who had made their Reason their God, and made their Convenience their Reason; allowed the killing of ones self, either to shun thereby Torture or Shame, and thought Death a Door, which every man might open at his pleasure: for, since death may surprize a man when he is not ready, they resolved to be some way equal with it, in forcing it to be ready, whensoever they pleased. And from their practice (for most of the Romans, especially the Govern-men, were of that Sect) flow'd these Roman Lavvs, *l. 3. §. sic autem ff. de bon. eor. l. si quis §. ult. ff. de pen.* By vvich they distinguished betvvixt such as killed themselves, to evite a just punishment of the Crimes for vvich they vvere accused; and such as killed themselves, *radio vite, vel doloris impatientia:* For the first, they punisht as Murder, but the last, they favoured vvith a lesser punishment. Nay, and in the Primitive Church, many for making themselves away, to evite thereby Idolatry, or Pollution, have been accounted as Martyres: Thus the Wife and Children of *Adauctus*, having killed themselves, when they were to be deflowred; it was doubted, if they ought not to have been numbred amongst the Martyres; *Ευτρεως ον αρθυματα ως μαρτυρας.* *Cedren. pag. 220.* and the like Story is reported by *Enseb. lib. 8. cap. 17.* of a Noble Lady, who was brought to *Maxentius*. But our Lavv is jealous, that such pretexts might be brought, to colour all base Designs; and allowing none to be their own Judges, has made no such distinction, as was found in the case of *Thomas Dobbie*, cited by *Craig. diages. de regal.* And to allow this, vvere to feed Despair, and to make patience, and ong-suffering, to be no Vertues.

II. Yet Furiosity and Madnes, ought to defend against all Punishment in this case since a furious Person has no will in the Construction of Law; And the Will is that which makes the Crime: nor should they be more punished than Infants are, to whom the Law compares them. Fury also defends against Treason, Blasphemy, and Heresie, which are more atrocious Crimes, than self-murder, & *facti infalicitas furiosum defendere dicitur, l. infans adl. Corn. de sic:* and therefore I cannot well understand, wherefore in *Dobbies* case (as *Craig* relates it,) the Lords repelled the Defence of Furiosity, and found that even furious Persons ought to lose their Moveables, if they killed themselves; but I think, the fury there has not been strongly qualified, and that it has been but a Species of Melancholy: for the reason given for that decision is, because the Lords thought no man would kill himself, if he were not distracted: and so if distraction could defend such as killed themselves, against confiscation of their Moveables, it would defend all who kill'd themselves, and so the Law should have no effect; but this must be interpreted, of some degrees of madnes, for sure no man kills himself, except he who is somewhat mad. Nor does Hypochondrick fits, or the first degrees of madnes, defend against this Confiscation, but a total Aberation from Reason, cannot but defend; which is also clear from the Law of England, *Bolton. Cap. 11. lib. 1.* And the difference betvvixt these two must be inferred from the various Circumstances, which attends such Diseases, and from the Declarations of Physicians, who waited upon them.

Whether one who is mad, but has lucid intervals, is presumed to have killed himself in his madnes, or lucid intervals, is not so clear, and depends much upon Circumstances: but since none use to kill themselves, except under some distemper; so therefore, it is more humane to refer this killing, to have been in the hours of madnes, except it can be proved that the killer used even in his lucid intervals, to wish he were dead, or to commend Self-murder, *vid. cal. cas. 289.*



III. An endeavour to kill ones self is punishable, as Self-Murder, if the killer did all that in him was, to effectuāt it; as if he hanged himself, but was immediately cut down. And by the Law of *England*, if a man wound himself mortally though he live year and day thereafter, his goods fall to the King, *Bolton. lib. 1. cap. 10.*

IV. Self-Murder may be committed by omission, as well as commission, thus if a man would starve himself to death, he might be punished by confiscation of his moveables; but the design must be clearly proved, since as many innocent people might be alledged, to have killed themselves, whilst they have fasted, either through pain or necessity.

V. When a man kills himself, his Majesty gifts his Escheat, and the Donator pursues a general Declarator thereupon, wherein he calls the nearest of kin; and he must prove there, that the Person, whose Escheat he has got, killed himself; which must be proved, by clear and convincing evidences, such as the depositions of Witnesses, or a paper under the Defuncts hand, wherein he declares the reasons of his discontent, and why he killed himself, which is very ordinary in these cases, wherein they design thereby to justify to the world, this horrid Act: But I think, presumptions are not sufficient here, since this is a Crime, except they be very strong and violent, but if they be such, it appears, they are sufficient to infer Confiscation: for though presumptions be not sufficient to prove a Crime, to infer Capital punishment, yet they are oft-times sustained, to infer Confiscation of Moveables, or other civil effects. And if presumptions were not sufficient in this case, Self-Murder could never be proved, for the committers choose retired places, and quiet times, for executing their wicked design: and who could say, but that if a man were known, to have express much despair, and thereupon to have entered into a Room, and were found with the Door closed, and hanging in his own Garter: but that these presumptions would infer Confiscation of his Moveables.

By our practice, thir Declarators have been sustained before the Lords, upon probation of the self-murder, led before themselves, without any previous tryal before the Justices: and some think such a previous tryal not necessary; for all tryals before them, are by Assizers, and dead men can not be tried by an Assize: but it might be alledged upon the other hand, that such a previous tryal before the Justices; is more suitable to the Analogy of all other Crimes, which are all tried before the Justices: And though it may be alledged, that the Lords jurisdiction is here founded, *ratione incidentie*, and that many Crimes are tried before them, as falling incidently in other civil cases; yet even in falsehood, though the Lords of Session are Judges competent to the deed it self: yet no mans Escheat falls upon their Decreet, though he be found a falsary by them, till he be also tried by the Justices, and the Escheat falls, as an effect of their sentence only. Nor has this exception been yet repelled, as to self Murder, so that *res est adhuc integra*, especially if the persons whose Escheat is craved, to be declared, be yet alive; so that he may be tried before an assize, for having endeavoured to kill himself: for some endeavours to kill ones self, are punishable by death, though prevented, as has been said formerly, and in that case, I conceive that previous tryal before the Justices, is necessary.

## TITLE XIV.

### Paricide.

- 1 *To what degree reaches Paricide by the Civil Law.*
- 2 *To what degrees by our Law?*
- 3 *Whether does the Act 220. Ja. 6. Par. 14. extend to Descendents?*
- 4 *Whether does that Statute extend to Bastards.*
- 5 *The punishment of Paricide by that Statute.*
- 6 *The 20. Act. Par. 1. Ch. 2. concerning beating of Parents, explained.*
- 7 *How the murdering of Children is punished.*
- 8 *Who are reputed accessory in this Crime, and how punished.*

I. **P**aricide is a Crime, which is committed by killing our Parents, against which, *Solon* refused to make any Law, least he should by forbidding it teach the People it was possible. By the Civil Law, Paricide was committed by killing Ascendents, or descendents in any degree: or Collaterals to the fourth degree. The killing likewise of Wife, Husband, or Patron, was Paricide by that Law, *l. 1. ff. h.t.*

II. With us, Paricide is by the Statute 220. *Ja. 6. Parl. 14.* punished only in him who kills his Father, Mother, Good-sir, or Good-dame; and these are by that Act, ordained to be disherished; and their Posterity, *in linea recta*, are incapable of succeeding to the person killed: but the Succession is devolved upon the next Collateral, or nearest of Blood; the person guilty being convicted by an Assize.

From which Act, it is observable, that the Statute is not exclusive of other punishments: but supposes that Paricide is capitally punishable, according to the Common Law; for it were absurd to think, the punishment here related, should be the only punishment, by which Paricide could be reached. And Women for murdering their Children, are frequently either hanged, or headed, as other Murderers. 2. This Act reaches only such, as are convicted by an Assize; and therefore *January 1664.* it was found, that *Sir James Oliphant* being declared Fugitive, for killing his Mother, but not convicted by an Assize, his Estate could not be gifted by the King: and in effect, though he had been found guilty by an Assize, he could not have been Forefaulted, for the nearest Collateral would seclude the Fisk. It was likewise found in that case, that the Son could not be Forefaulted, as having murdered his Mother, under Trust, for they found that, not to be the Murder, which is declared Treason by the *11. Par. cap. 51. Ja. 6.* For the Trust there mentioned is, when such as came under the trust of others, were persons who would not have come within their reach, without special Assurance of Indemnity, and Protection; And it is related as a received Tradition amongst us, that this Act was first made upon *Mackdonald*, his killing the Laird of *Mackelane*, who came to lodge with him, upon such Assurance; notwithstanding of the Feids which were amongst them. It were likewise improper to say, that the Mother was under the power and assurance of the Son, and if the power, and assurance betwixt Parents and Children, could fall under that Act, *Par. 11. Ja. 6.* This Act had been unnecessary, and there could have been no place for the  
Pain

Pain therein contained; for the Estate of the Traitor belongs to the Fisk, and not to the nearest Collateral.

III. It may be doubted, if this Act should be extended to Parents killing their Children; and albeit the Statute does not, *in terminis*, express Descendents: Yet it is probable they may fall under its Sanction: Even as the foresaid Text, in the Civil Law is extended to equal degrees, with these express, *ob paritatem rationis*. And by that Law, the killing of Ascendents, or Descendents, is Paricide, *patricium, filicidium, & matricidium*. And the Rubrick of this Act, runs generally against paricide: nor can it be denied, but paricide is committed by mothers against their children, and Women are dayly convict thereof.

Whether the foresaid Statute against Paricide can be extended, to degrees of Affinity, as well as degrees of Consanguinity; so that to kill a father-in-Law, may be punished as Paricide, as well as the killing a father may be doubted: but I conceive it extends not to degrees of Affinity; because 1. Laws against crimes should not be extended. 2. The Statute discharging, Fathers, Brothers, or Sons, to judge in the causes of these relations, is not extended to Brothers in Law &c. though that extension would be more favourable. 3. Some of these relations in this statute, cannot in propriety of speech, be extended to degrees of Affinity, for we say not good-Sir, nor good-dame in Law, & albeit. §. 6. *just. de pub. judic.* uses the word *adfinnatis* in this crime, yet Theoph. in his Greek *inst. cod. §.* expresses the same, by the words *τὸν ἀντὶν διαίονον* which signifies *affectionis canon adfinnatis*, and with Theophil. agrees 36. *eclog. l. iii. 40.* *ὅτι πατρίανον*. and this shews advantages by the Greek Lawyers.

IV. Whether it doth extend to Bastards, may be doubted; for though it be certain, that since they know their mother, it may be therefore extended against them, if they kill her, or she them. Yet since their Father is uncertain, *natus sunt vulgo quæstus, & patrem demonstrare nequeunt*; and since they have no advantage by their Father, in Law, it were hard the Law should punish them, as Paricides. But yet Lawyers conclude they may be punished, for Paricide. *Alex. ad lib. 2. de injur. voc.* and since this is a Crime against the Law of Nature, it may be punished in Bastards, who are natural Children.

V. This Crime extends not to Moveables by the Act, but by our Law; wherever the Law punishes by death, it implies confiscation, for Moveables followeth still the person. And by the Law of France, (from which we have borrowed this, and many other things) *qui confisque le corps confisque les biens*.

It is probable that upon this Act, even absents may be convict of this Crime; as the Lords then thought, if the certification of the Letters had born the Penalty here express. For albeit probation cannot be led, in absence of the Party, to fix a Crime upon him, yet this seems to be a civil effect, which strikes not against the person of the committer.

By the Civil Law also, all Murderers were debarred from succeeding to such whom they murdered. *l. cum ratio. §. fin. ff. de bonis damnat.* which is yet observed in France, but though with us there be no contrary decision; yet with us they are not debarred, and seeing this pain is only statuted in the case of Paricide, we may by a natural consequence conclude, that it should not be extended to ordinary Murders.

VI. By the Act 20. Parliament 1. *Seff. 4. Ch. 2.* Beating or Cursing of Parents, is declared to have been punishable by the Law of God, with death: And therefore ordains, that whatsoever Son, or Daughter, above the age of Sixteen, and not distracted, shall beat or curse his Father or Mother, he shall die without mercy, but if they be within the age of Sixteen, and past pupillarity, they are to be punished arbitrarily: From which it is to be observed, 1. That this Crime is meerly statutory, and therefore should not extend beyond the Decrees of the act to grand-fathers, or grand-children, albeit *appellatione filii*



*filii & nepos comprehenditur in favorabilibus.* 2. That arbitrary punishment is opposed to death, and so never can be extended in other acts to death. 3. That those who are not above the age of Pupillarity, are not capable to commit crimes, nor should be punished, for they are here accounted as distracted persons, and if they were punishable for any Crimes, it behoved to be for such as are against the Law of God.

VII. It is very easy, and too ordinary for women who bear Bastards, to murder them; And therefore to obviate this, the Law presumes so far, a woman who has born a bastard, and has concealed her being with child, to be guilty of Paricide, if the child be found dead, that it punishes her by some extraordinary punishment, (but not by death) except she can prove that the child was born dead: Thus it was decided in *Savoy*. 1595. *vid. cod. fab. de his qui parent occid. Def. 11.* And with us *Lawson* and *Ramsay*, were both scourged *annis* 1661. and 1662. even though they were absolved from the Murder. But I think that this were severe, if the woman openly acknowledge that she was with child, though none was present when she brought it forth, and in all such cases women are admitted to be Witnesses.

The taking Potions, also to make one part with Child, *abortum procurans*, should be a species of Paricide, in my opinion, since she thus endeavours to kill her own child: and by the civil Law, it was punished with death. *L. Cicero ff. de penis.* And though the Doctors distinguish here betwixt the using such means after the child is quick, or before it, making it capital in the one case, but not in the other; yet they presume that the child was quick, *quod fetus erat animatus* and that in odium delinquentis, and burden the delinquent to prove the contrair, *Gomes. de delicta cap. 3. num. 32.* asserts that this is presumed not to infer death, but Ecclesiastick punishment; and since to prove the contrair, seems to me, impossible, I incline to *Gomesius*, his opinion: but yet the using such means, even before the birth be quick, is arbitrarily punishable, as is even the using means to hinder conception. *Marfil. ad l. si mulierem ff. de sicar.* And in these cases, both the Physicians who administer the cure, and the woman who takes, are equally punishable, *Marfil. ibid.*

VIII. So horrid is paricide, that what would be but a degree of guilt in other crimes, makes a compleat crime here, and thus a child endeavouring to poison his father, *καὶ μὴ συνθῆναι δούλῳ* *l. Basil. h. t.* and to kill parents by giving them wounds was punished by death in *Savoy*, *C. fab. h. t.* though the wounded parent interceded to the contrair. And the Son who bought poison to poison his father, though he was not able to give it: *Carer. §. homicidium. num. 128.* for which crime, suffered with the Son, the Physician who furnished the drugs *καὶ ὁ ἰατρός ἔχων τὴν τιμωρίαν*. *l. 2. Basil. h. t.* and the person who lent the Son the money to buy them: but regularly these strangers are not capitally punishable for such an accession, except the crime take effect: and this is the present custom of Nations, though by the Roman Law, and the *Basiliens*, they who were conscious or lent the money, or were surety for money to be bestowed were guilty, *ὁ συνδουλὸς διατρεφὼν αὐτὸν καὶ ὁ σφραγιστὴς αὐτοῦ ἀσφαλισμένος*. And yet he who who commands a son to kill his Father, is not guilty of Paricide, *Cepol. Consil. 36.* which may seem strange, since to give poison to kill a Father, seems equal guilt to giving a Son command to kill his Father. As these circumstances heighten Paricide, so there are some which restrict the punishment, as if the Father should find that his Son had lyen with his own mother-in-law, and had killed him upon that account, though not in the very act, *ὁ πατὴρ τοῦ υἱοῦ μοχευομένου τὴν αὐτὴν γυναῖκα καὶ περικορπῶν*: Lawyers think, that he should be only punished by banishment, but not by death, and that generally for whatever crime, or fault, a father may exheredate a son, that the same fault will excuse the father from death if he kill his son. *l. divus ff. de paricid. & Cabal. cas. 15.* Some also think

think that a woman killing her husband who is banished, and upon whose head a Fine is put, is not punishable by death, because her husband is *nullus in jure*, and Lawvrs allowv all to kill such a person, vvithout any distinction betvvixt vvives or others: yet other Lavvyers have concluded, that she should be punished by death, since such sentences, loose not the vvifes natural obligations, but he is still her husband, and the Lavv owns so far the relations, as not to punish her for omitting to kill him, or for cohabiting vvith him. *Cub. consil. 278.* A father killing his son by accident, ought not to dye, and therefore, much lesse he vvho kills him in defence of his ovvn life, for self-defence is a duty.

This crime is so odious that it prescribes not. *et vti punitur vti dicitur et vti dicitur.*

## TITLE. XV.

### Incest, Sodomy, Bestiality.

1. What Incest is, and the several kinds thereof.
2. The punishment of Incest by our Law.
3. Sodomy, how punished.
4. Bestiality, how punished.

**I**ncest is defined by the *Civilians*, to be, *feda & nefaria maris & famina commixtio, contra reverentiam sanguini debitam.*

Incest is divided into two branches, *viz.* that which is committed against the Law of Nature; and into that which is committed against the Municipal Law of the Countrey. All copulation betwixt ascendents and descendents, such as Grand-father, Father, Mother, Son, Daughter, &c. is by all acknowledged, to be Incest against the Law of Nature. But it is controverted, whether the Brothers lying with the sister, be Incest against the Law of Nature: And the *Roman Catholics* alledge it is not, because it was allowed at the beginning; and therefore they conclude that the Pope may dispense therewith; And this is the first difference betwixt that Incest which is committed against the Law of Nature, and that which is committed against the Municipal Law.

The second difference betwixt them is, that the pain of Incest when it is committed against the Law of Nature, is death: but when against the Municipal Law, it is only deportation, *l. 5. ff. de quest.*

The third difference is, that Incest committed only against the Municipal Law, is excused (in a woman, *in figura matrimonii*) but ignorance of the Law of Nature is not; But the man is inexcusable in either, *Matheus hoc tit. num. 5.*

The fourth difference is, that if a Marriage contracted, be rescinded, as incestuous, all the committers goods are confiscat, if the Incest be committed against the Law of Nature: but the Tocher and Joynter are only confiscat, if the Incest be only committed against the Municipal Law, *Matheus.*

**II.** Our Law does not observe the above-written distinction, but it is universally Statut. *act. 14. p. 1. §. 6.* That whosoever pollutes his body with such persons in degree, as Gods word doeth contain in the 18. of *Leviticus*, shall be punished with death; Albeit by these words of the act, whosoever abuses his body, it would seem that such as actually copulat, are only punishable

able by this act: Yet I think *nudus conatus*, or endeavour, is punishable by death, as it is in Sodomy; in which, endeavour is punishable, by the opinion of the Doctors, though by the Law of England, Sodomy requires *habuisse rem veneram & puerum carnaliter cognovisse*; Cook. p. 59. albeit the manner of death is not express in this act, yet practick hath determined the same to be hanging; as in the case of *Barnoch*, who was hanged for committing Incest with his own sister, Decemb. 8. 1641. And of *Jean Knox*, who was hanged for committing Incest with her husbands brother May 1646 Sometimes it is likewise punished with heading, as in the case of *James Strang*, who was beheaded for committing Incest with his brothers daughter, the 4. of April 1649.

III. Sodomy, is when a man lyes with a man, for which both are punishable by death, *l. cum vir nubit C. de adult.* they are burnt in France and Savoy, as *Gothofred* observes, by the 25. act: Henry the 8. Sodomy is declared Felony, and the punishment of Felony by the Law of England, is in all cases to be hanged by the neck till death.

Though *Carpzovius*, and the other Doctors, are of opinion, that confession alone is not a sufficient probation in this Crime, except other presumptions concur for clearing that the Crime was truly committed, yet with us the confession it self, without any other admitticks, is sufficient to infer the punishment of death except the confessor be known, or at least suspected to be distempered.

*Mastrupatio est ubi quis propriis manibus aliove instrumento se polluit & punitur ut sodomia.* Carp. Part. 2. Quest: 76. *hec pana non est in usu apud nos.*

IV. Bestiality is, when a man lyes with a Beast, which the Romans also punished with death, and in which some Lawyers affirm the endeavour is as highly punishable, as the Crime it self, *affectus sine effectu.* Papon. lib. 22. tit. 7. art. 1. *Damhard. cap. 96. n. 16.* Which opinion they found upon the atrocity of the Crime: and it seems that he deserves not to live, who could harbour such horrid thoughts; but especially if he did all that was in his power to put his design in practice, and was only letted by some interveening accident *οι αλογωμενοι, ητοι κτηνοβασι.* But yet other Lawyers conclude, that even in this crime the endeavour is punishable by a less severe punishment than death: which seems clear by *l. 1. §. fin. ff. de extraord. crim. qui puero stuprum abducto ab eo vel corrupto comite, persuaserit, aut mulierem puellamve interpellaverit, quidve impudicitie gratia fecerit, perfecto flagitio punitur capite, imperfecto in insulam deportatur.* And though in hotter Countreys, where Custom and Climat, lessens this Crime, the Crime is by their Lawyers thought punishable less severely; yet with us death ought to punish it, if the delinquent was only letted by others.

And in both thir crimes of Sodomy and Bestiality, witnesses who are lyable to exceptions will be received, because of the atrocity of the crime. *Bos. de judiciis.*

We have no particular statute for punishing either Sodomy or Bestiality, for they are Crimes extrordinar, and rarely committed in this Kingdom: but our Libels bear, That albeit by the Law of the Omnipotent God, as it is declared in the 20. c. of *Leviticus.* As well the man who lyeth with mankind, as the man who lieth with a Beast, be punishable by death. Yet &c. The ordinar punishment in both these, is burning, and the beast is also burnt, with which the Bestiality is committed: as in the case of *James Fiddes*, who being convict of Bestiality, was ordained to be burnt in the last of May, 1650. And *Major Weir* April. 1670. Yet sometimes it is only punished by hanging, and thus *John Loggie* was only hanged in July, 1642. and *James Wilson* was only hanged for the same crime, 15. Feb. 1649. which last Sentence bore, that the execution should be very early in the morning, and ordained the Mare with which



which the Buggery was committed, to be drowned in any Mofse or Loch.

## TITLE XVI.

### Raptus, Ravishing.

- 1 *The Nature of a Rapt described, and its punishment.*
- 2 *Whether the violent lying with a Woman, without the carrying her away, be a Rapt.*
- 3 *If the carrying a Woman away upon any other Account than Lust, be a Rapt.*
- 4 *If the carrying her away without lying with her, be a Rapt.*
- 5 *If a Womans carrying away a Man, be a Rapt.*
- 6 *Whether a subsequent Consent purges this Crime.*
- 8 *Some Instances of the punishment of this Crime.*
- 7 *Whether the Parents consent not being obtained makes a Rapt.*
- 9 *Whether Minors, and such as force common Whores, be punishable for a Rapt.*

**R**apt or Ravishing, is that Crime, which is committed in the violent carrying away a Woman from one place, to another, for satisfying the Ravishers lust: And is in the Civil Law punishable by death, *l. un. C. de Rapt. virgin. &c.* In our Law, it is one of the four Points of the Crown; that is to say, the Cognition of it belongs only to his Majesties Justices, and not to any other Judge; *R. Maj. l. 1. cap. 1. N. 6.* and is punishable by death, and confiscation of the Committers Moveables. For albeit I remember not that the punishment of death be expressly appointd for it; Yet in the *8 cap. l. 4. R. M.* It is said expressly that it shall be punished as the other Crimes above related, and these are Murder, Treason, and Fire-rising; which are all capitally punished. And by the Act. 4. P. 21. §. 6. It is declared, that albeit the Consent, and Declaration of the Woman ravished, declaring that she went away of her own free will, may free the Committer from capital Punishment: Yet shall it not free him, from such arbitrary punishment as his Majesty shall inflict, by Warding, Confiscation of their Goods, or imposing upon them pecunial Mulcts. Which Act insinuates that the Crime is otherways Capital, else that Act had been unnecessary.

II. The Definition given of a Rapt, *l. 4. c. 8. R. M.* is, that it is the unjust oppressing of a Woman, by a Man, against the Kings peace, in which it differs from the Civil Law; at least from some Doctors, who alledge, that lying with a Woman, or abusing her body violently, is not a Rapt, except she be carried from one place to another: Albeit they do confess, that this Violence is punishable by Deportation, or Banishment, and is, as some affirm, *non Raptus, sed Stuprum, l. 3. C. de ad leg. Jul. de vi.* But yet other Lawyers, and chiefly *Mathæus*, do conclude, that albeit the away taking, and the forcing, or violent abusing a Womans Body, be differently punished; yet they are degrees of the same Crime, and both are Rapt: But according to our Law, both are Rapt, and both punishable by death. Neither does our Law make any distinction, *inter Raptos, & deforciatores mulierum*, betwixt Ravishers, and Deforcers of Women; and it were most unreasonable, that he who deflowres a Woman violently, should not be as severely punished, as he who only carries her from one place to another: for as the person ravished loses

more by that abuse, than by her Transportation; so it were absurd, that *apparatus ad crimen*, should be more severely punished, than *effectus criminis*; that the accomplishment of the Crime should be a less guilt than the Preparations to it: amongst which this Transportation is but one.

III. If the Woman be taken away upon any other Accompt than that of Lust, it is not a Rapt, and so if she be very old, or if the Away-taker had a quarrel against her, it is not a Rapt, *Decius concil.* 234.

IV. *Quer.* What if the Ravisher did not carnally know the person Ravished, whether in that case, the Away-taker be punishable as a Ravisher capitally? And albeit the ordinar Distinction be, that if he did not, because he could not, then he is punishable: but if it was in his power to have deflowered her, but abstained, then he is not to be punished capitally, but only arbitrarily. *Clar. §. raptus num. 4.* Yet I think, that in our Law he is in no case to be punished capitally, except he deflowered her: For 1. In the foresaid 1. cap. l. 1. R. M. it is said, that *affectus sine effectu*, is punishable in Treason, because of the great wrong done to the whole Kingdom: But this Reason ceaseth in Rapt, and when Rapt is spoken of, in the immediat next Verse, this is not repeated. 2. The gloss upon the Word, oppressed by a Man, l. 4. c. 8. interprets Oppression to be Suppression, or Corruption, and in the 9 Verse of that Chapter, it is rendred Corruption, & it is spoken of there, as *sedatio mulieris & pollutio*. 3. By the Norman Law, with which our old Customs have much Contingency, Rapt is called *depucellement des femmes a force*, l. 12. c. 1. Yet I think that any such wrong done to a Woman, is punishable, *tanquam crimen in suo genere*; and after the Crime of Rapt, or Ravishing is spoke of in that Chapter, it is said v. 8. That if a Woman accuse a Man of any other wrong done to her body, she will be heard.

In that Chapter also, it is appointed the Woman ravished go whilst the Crime is recent to the next Town, and there shew to honest men the Blood, or other wrongs done her, and thereafter go to the Mair of the Lordship, or to the Toscheoderoch, which *Skeen, ad R. M. l. 1. c. 6.* Interprets to be *Serjandus curia*, but *Boeth.* in his History calls them *latrunculatores*, or the taker of Thieves: And thereafter to the Sheriff, and last of all to the Justice: But the form now is only to raise Letters, as in other Crimes, before the Justice. And albeit of old, she was obliged to insist within 24 hours, *intra unam noctem*, else not to be heard, c. 10. l. 4. R. M. Yet that is now antiquated by Custom; Albeit it was a strong Presumption in the opinion of the Doctors, and is so in our Practick, that the Pursuit is malicious, when it is delayed; for it is most presumable, that a Woman would not conceal any time such an Injury.

V. It is doubted much among the Doctors, if Women who ravish men are punishable as Ravishers; And albeit our Law speaks still of ravishing Women, yet I think that as women are guilty of Man-slaughter, so women may be guilty of this Crime; and by the 9. v. c. 8. R. M. It will appear that this was designed for both Sexes: Albeit I think it be not punishable by death, seeing it cannot take effect, except the Man pleases, & *affectus sine effectu non punitur capitaliter, in hoc crimine.*

VI. & VII. By the opinion of Lawyers, the subsequent consent of the Women ravished, did not absolve the Committers, *Cin. in l. un. h. t.* And albeit by the Council of Trent, Marriage may be contracted lawfully betwixt them, yet the Committer is still punishable; and by the foresaid Law C. *de raptu*, the words are, *nec sit facultas rapta raptorem suum sibi maritum exposcere.* But by the foresaid Act. J. 6. P. 21. this question is determined with us, for that consent only saves from capital punishment, for the Committer may be put to the knowledge of an Inquest, either at the instance of his Majesties Advocat, or the

the Parents or nearest kin, from which Act it may be observed. 1. That the **Advocat** or nearest of kin may insist, without one anothers concurrence. 2. That if the nearest of kin do not insist, they who are in remoter degrees cannot insist in this case, and crave that the Ravisher may be put to the knowledge of an Assize, although the Woman declare that she was not ravished Albeit I think that before any such consent be declared, any of her Friends may insist, 1. *un. C. de rapt. & si pater injuriam remiserit extraneus remm postulare poterat.* 3. Except it be proved that the rapt was committed at first, without consent of the woman, and nearest of kin, it is most punishable. It may be argued, that if either the nearest of kin, or she, consented before the rapt, it is not punishable: and it is probable, that if the nearest of kin consented, though the woman did not, the away-taking is not capitally punishable; for where the nearest of Kin, and parents consent, the ravisher deserves not so severe a punishment as death. 4. Because the womans consent is so hard to be known, for she might have at first consented, albeit she cryed or resisted upon design: Therefore I think her Oath should be first required, & if she be content to swear that she went willingly alongst, that should, in my judgement, preclude the pursuers from any further pursuit; or if they can prove that there was any design of marriage amongst them, previous to the away-taking, *Mar. fl. consil. ibi & Bos. de rapt. N. 17.* 5. Since by the foresaid Act, it is said, that if any be pursued as art and part of rapt, the womans consent in that case shall free them from capital punishment, it may be doubted if the Womans Consent will free from capital punishment, him who is pursued as principal actor, since the act is not express as to him, and since he deserves not so much favour as the complices do: But yet I conceive the same favour should be extended to him, both because our Law equals principals and complices, and because the Doctors, and the Laws of other Nations extend this: Before this act by the 8. *cap. R. M. l. 4.* And yet it is declared there, that it shall be Lawful to the parties to marry with his *Majesties* consent. The Arbitrary punishment allowed his *Majesty* by the foresaid act of Parliament, *J. 6.* is not interpret so that his *Majesty* should be personally consulted, But His *Majesties* council supplies that in his absence; as was found in the Baxters case, 1666.

VIII. Albeit this crime be capital, and that *William Bannantine* was hanged for taking away the Laird of *Achingtons* daughter, 5. July 1596. yet I find that *John Kincaid* having come in the Kings will, Feb. 1601. for ravishing *Isobel Hutchison*, a Widow, the King only fined him in 2500 Merks. *Harry Speed* was hang'd 20. Feb. 1639. *quia laceravit pudenda pueri*, which crime, *Jul. Cla. Gothofred*, and others, affirms to be also capital in their Countries.

I find one Lieutenant *Ker*, pursued for ravishing and away-taking *Robert Cunninghame*, 6. Feb. 1640. but this is rather a species of *Plagium* than of Rapt.

IX. Since minors are punishable by death for adultery, much more ought they to be punishable by death for a rapt. since the injury is there both more atrocious, and more unnatural; and *Carp. part. 2. quest. 75.* gives us several instances where this Crime was capitally punished in minors, where he likewise tells us, that to force even a common Whore is capitally punishable, tho it may seem that they are *infra legum observantiam*, and they ought not to have the protection of the Law, who offend against it.



## TITLE XVII.

### Adultery.

- 1 The definition of Adultery, and whether the lying with an unmarried Woman, or with a Whore, be Adultery.
- 2 The punishment of Adultery, by the Law of God, and our Law.
- 3 The differences betwixt single and nottour Adultery.
- 4 Whether death can be inflicted for single Adultery in Scotland.
- 5 Whether the Marriage ought to be proved.
- 6 Who can be punished as accessories in Adultery.
- 7 What Probation is requisite in Adultery.
- 8 Whether a Decreet of Divorce before the Commissaries is sufficient to prove Adultery in a Criminal case.
- 9 Whether he who hearing his Wife was dead, married another, be punishable as an Adulterer.
- 10 Whether a Pursuit being intended for nottour Adultery, and single Adultery only proved, if the single Adultery can be punished in that case.
- 11 How adulterous Children succeed.

**A**dultery is a Sin, whereby Men not only violat the second Table, in wronging their Neighbour, by stealing from him his quiet, his good Name, the Affection and Person of his Wife, endeavouring also oft-times to steal his Estate for the Adulterous Children ; But is likewise a breach of the first, in breaking of that Vow which was made to God in Marriage, and contemning that holy and mighty Majesty, who was then called upon, as Judge and Witnes.

I. *Adulterium est vitatio alterius thori*, the Violation of anothers Bed, and is committed by a married persons lying with one unmarried, or an unmarried person lying with one who is married. For albeit by the the Civil Law when a Man who was married, did ly with a Woman who was free, that was judged to be no Adultery ; And albeit the lying with a Whore, by the Civil Law was judged no Adultery, *l. 22. Cod. hoc tit. Si ea qua supra tibi cognita est & passim venalem formam exhibuit ac prostitutam meretricio more vulgo se præbuit adulterii crimen in ea cessat.* Upon which Law the Doctors conclude, that though he who first debauched a Woman with adultery, be punishable as an Adulterer, yet these who did thereafter debauch her, cannot. *Farr. Quest. 141. num. 85.* Yet this is against both the Law of God and our Law, for the lying with another Mans Wife is still Adultery, but so it is, that though she be a Whore, yet she is another mans Wife. Nor is the Marriage dissolved by the Adultery ; And yet I think, that if the Woman with whom the Adultery is committed, was at the time when the same was committed, living as a common Whore, and the Committer was a single Man, who knew not of her being married, his punishment should be somewhat moderat upon that accompt ; But if the Committer was married, the Crime is the same, whether the woman was a Whore or not, since it is still a Violation upon the Mans part. To ly likewise with a mans betrothed, or promised Spouse, or as we say, his Affidat-Spouse, is Adultery, *nam nec violare licet matrimonium, nec spem matrimonii. l. 13. §. diu. 6. ff. h. t.* which agrees, as I conceive, with *Den. 22. 23.* Where he who lyes with a betrothed Virgin, should be stoned as an Adulterer, because *saves verse 24.* he

he lyes with his Neighbours Wife. And he who lies with a betrothed Virgin, who is to be shortly married, renders the Succession as doubtful as he who lyes with a married Wife.

II. The punishment of Adultery by the Civil Law, was death, as some think, by the Julian Law, *relegatio*, or banishment, as others think; but certainly the pain of death was the punishment to be inflicted, by that excellent constitution, *leg. quamvis cod. hoc tit.* Albeit thereafter *Justinian* did by the 134. N. cap. 11. remit to the woman the pains of death, and ordain her only to be imprisoned in a Monastery.

By the Law likewise of most Nations, adultery is only punishable by pecuniary mulcts: Albeit by the Law of God it was punishable by stoning both man and woman to death, 20. *Deut.* 22. Which punishment some think likewise to have been abrogated by our Saviour, because when the woman accused for adultery was brought before him, he did dismiss her without any punishment; but this is very groundles, for our Saviour came not to be a Judge in such causes, as himself declares: and though he had been a Judge, yet she wanted an accuser.

III. Our Law divides Adultery, in that which is notour Adultery, and single Adultery. Notour Adultery is by the 74. *Act. Parl.* 9. 2. *Mary.* declared to be punishable by death, after premonition is made to abstain from the said manifest and notour Crime; which premonition had its origin from *Auth. si quis C. ad l. 1. de adult.* by which it was lawful for the Husband to kill him who was thrice premonished not to converse with his Wife. And in effect, the design of that Act was only to punish a horrid abuse, which was then ordinar, *viz.* the taking away other mens wives, and keeping them openly as their own, to the great contempt of Law. Yet by the explication of this Act, which is given by the 105. *Act.* 7. *Parl.* 3. 6. That is only declared to be notour Adultery, where, 1. There are Bairns one or more procreated betwixt the Adulterers. 2. When they keep company, or bed together notoriously known. 3. When they are suspected of Adultery, and thereby gives slander to the Kirk, whereupon being admonished to satisfy the Kirk, they contemptuously refuse, and for their refusal they are excommunicat: If either of which three degrees be proved before the Justices, the committers are punishable by death. From which Act it is to be observed, 1. That though by the first act premonition to abstain was still to be made in all cases, yet in neither of the two first cases here related it is declared necessary. But since it was not lawful to kill him who was premonished, and thereafter conversed, except they conversed in suspect places, *Gribald. de homicid. num. 11.* It seems that in neither of these Statutes conversation should be criminal, even after prohibition, except it be in suspect places. 2. The Justices are only declared to be Judges to the notoriety of Adultery, and therefore it may be controverted, if Lords of Regality be Judges competent to the cognition of it. 3. This Act does not exclude capital punishments in other cases of Adultery, but only ordains that these three degrees shall be punished by death. And since there are other cases more grievous to the party injured, and more scandalous to the common-wealth; it may be argued, that the punishment of death should likewise be extended to them; as for instance, to commit frequent Adulteries: And it appears it is upon this account that the sentence of death was pronounced against Sir *John Stenart.* for three Adulteries, 15. *August* 1628. As also, *Isobel Hamilton* being pursued in *July*, 1647. for Adultery, and having enacted herself never to return, under the pain of death; she having thereafter returned, was immediatly, without any other Process, by an order from the Justices, execute in *Anno* 1649.

IV. And albeit there be no expresse Law for inflicting death in other cases, upon ordinary Adulterers, yet I see no reason why the Justices may not as well, for the good of the Common-wealth, inflict death, without any expresse Law here, as they do in Theft, and other less Crimes: And in effect, Adultery includes Theft, as I said formerly; and albeit *inclusio unius est exclusio alterius*, and that it may be argued, that by the former Act, appointing death in the cases above cited, the punishment of death is thereby excluded in other cases: yet to this it may be answered, that the foresaid rule is only a Brocard and hath only the strength of a presumption, and therefore take only place in favourable cases, but should not be extended in prejudice of the Law of God, which expressly ordains Adulterers to die. And in the foresaid 74. Act. 9. Parl. 2. Mary. It is declared that this Act shall be but prejudice of all other Acts and Laws already made, with all rigour; but I can find no other Act made prior to that ament Adultery, whereby the punishment is limited; and therefore I believe that that Act relates to the punishment related to by the Law of God: At the least I think that the Magistrate is left to his own freedom to consider circumstances. And whereas it may be alledged that if single Adultery were punishable by death, these Acts had been needless. To this it may be answered, that the design of the former Acts was to necessitate the Magistrate alwayes in the cases exprest in that Act to inflict death, and not to empower them only to do so: And seeing single Adultery is punishable by the Magistrat, sometimes by banishment, as in the case of an English woman, in Decemb. 1668. sometimes with scourging, as in the case of Ridpath, Decemb. 1642. And sometime with fining, as in the case of that woman who committed Adultery with George Swintoun, in Anno 1666. though there be no expresse Law warranting them to inflict these punishments, and vvhhereupon the Pursuer is forced to found his Summonds upon the Law of God, and Lawv of Nature, upon vvhich Lawv they are sustained, vvhithout citing any Municipal Lawv, as in the case of that English vvoman: I see no reason vvhy they may not by the same Lawvs inflict likewise the punishment of death. Albeit the foresaid punishment of death be appointed in cases of notour Adultery; Yet the Council does use to mitigate the punishment, and so they ordained only Ridpath a Tinker, though he vvas found guilty of double Adultery, in keeping another Tinkers Wifetvvo years, to be only scourged, banished, and burnt on the cheek, December. 4. 1662. But the reason here vvas, because Tinkers are in effect vile persons, vvho are seldome ever lavvfully married: And in such I find of old, Adultery vvas not punished by death, as l. 29. C. b. 2. vvhere Adultery committed vvith a Taverner is not punished severely, *quas vita vilis dignas legum observatione non credidit, & erant infra legum curam*. And some respect vvas likewise had here to that absurd custom amongst Tinkers, of living promiscuously, and using one anothers Wives as Concubines. The Council sometimes do likewise banish persons for Adultery vvithout suffering them to come before a Justice Court, even vvhere notour Adultery might be proved against them, as in the case of Jeals Thyre an English man, for committing Adultery vvith Margaret Hamilton, vvho at her death confessed that the said Thyre had lyen several years vvith her, and that he had alienat her affection from her Husband, vvvhich induced her, though vvithout his accession, to kill her Husband, and that she had several Children by him, all vvvhich in effect vvvere great aggravations of the Crime, and he deserved vvell to have dyed. From this it appears that the punishment of ordinary Adultery is arbitrary, and useth to be inflicted, either by banishment, whipping, fynyng, or imprisonment. If a person be only banished for adultery, and return again without leave here, she may be execute; and thus the Justices found by advice of the Council, in the case of Griffel Hamilton, December 1649. Or if



if Adultery be complicated with any other Crime, the guilt is thereby augmented, and the Crime may be capitally punished; Thus *Margaret Thomson* was executed for committing Adultery with a Minister, and for falsifying a Testimonial, to the end she might get her Child Baptized, *May 28. 1646.*

V. Since Adultery is only committed betwixt married persons, it is therefore requisite that the Libel in Adultery bear, that such persons were married; and one of the ordinary faults committed by the Pursuer in this Crime is, they seldom ever lead Witnesses for proving the marriage, without which be proved, or be notour to the Assize, they should not syle the Pannel, though Copulation be proved. But though the marriage be not just, but only a supposed marriage, or *matrimonium putativum* (as Lawyers call it) yet the violation even of that marriage, will infer Adultery. As for instance, if a man not knowing the relation, should marry within the degrees *descendent*; though there be in that case no lawfull marriage, yet if either of these parties who are married, should ly with any other, they will be guilty of Adultery, *Cravet. Consilio 205. num. 36.* The reason whereof is, because the committer did all that lay in his power to commit Adultery, which is the main thing to be looked to in Crimes, *nam proposita maleficia distinguunt.* And from this I am much inclined to think, that *conatus*, or an endeavour to commit Adultery, if the Adulterer did all that in him lay to accomplish the said design, makes the committer guilty of Adultery, if that design was brought the length of being in *actū proximo*, as Lawyers call it: though in that case I think the rigour of the ordinary punishment should be somewhat remitted: & *hac attentatio est punienda pana extraordinaria judicis arbitrio. Tiraquell. de panis, Cas. 39. & 40.* He who allowed his house to the Adulterers for perpetrating their Crime, is punishable as an Adulterer, and he who gave them the use of his house for consulting about the committing of it, though it was not committed, is punishable as an Adulterer, *ὡς καὶ τὸ τιμωρεῖται, Basil. l. 11. h.s.* He who retains his wife, after he finds her committing Adultery, and lets go the Adulterer, is punishable as a Pimp, *l. 30. ibid.* But this is not in observance with us, except the Husband took money to conceal the Adultery, and therefore that Law doth well determine, that he who remits the injury for money, *ὡς καὶ τὸ διαμνηστὴν λαβόν, is punishable as an Adulterer, but not he who remits it freely.*

VI. He who gives warrant, and order, or hires others to commit Adultery, is guilty, and deserves the same punishment with the Adulterer, according to the opinion of all Lawyers. And in effect, he is more guilty, seeing he wants the natural temptation of the Adulterer, and commits the Crime in effect out of meer malice, and in contempt of the Law: And therefore Lawyers conclude, that the Husband hounding out, or hyring others to commit Adultery, cannot pursue his Wife for that Adultery which he occasioned: and yet it being alledged against *Rocheid* that he could not pursue *Elizabeth Muir* his Wife, because in effect he had hired others to lye with her, and so was *Leno*. It was answered, 1. *Lenocinium* was only in the case, *ubi maritus quasi sine facit de corpore uxoris, ὡς καὶ λαμβάνει ἀπὸ μισθίου τῆς αὐτοῦ γυναῖκος*, or keeps a Bordel, or prostitutes her for money. 2. This exception could only exclude the Husband from pursuing a Civil suit of Divorce, but not from pursuing a Criminal suit for Adultery. 3. Though it excludes the Husband from a Criminal Pursuit, it could only exclude him from such a Criminal pursuit, as was intended upon these Acts of Adultery to which she was tempted, or which she committed with her Husbands consent, but not from pursuing her upon such Acts as she had committed formerly, without her Husbands knowledge. 4. The Advocate concurred in this case, who, nor the publick Interest could not be prejudged by any connivance or Crime of the Husband: In respect of

which reply the defence was repelled. But to examine this *Interloquutor*, It is certain that the fourth reply was *per se* relevant, for certainly the *Advocat* might have concurred without the Husband, the Lybel being conceived in the *Advocats* name, as well as the Husbands, but not otherwise : But as to the other replies, I think they were not relevant *per se*, for it were most unjust that the Husband should have liberty to pursue that as an injury, which he himself had occasioned, nor should he be allowed to call that an injury done to his wife, the like whereof he himself had solicited with Money ; And seeing in Law, that Husband who consents to his wifes Adultery, is called *Leno* or *Pimp*, much more should he be reputed guilty of being a Pimp or Baud, who invites or hires others to lye with his wife ; & certainly as it is a greater crime to hire others to lye with a woman, than to lye with her himself, because there is not so great temptation in the one as in the other, so certainly there is more of crime and malice in giving money, then in taking money in this case, since money may be taken out of poverty, whereas it never can be given with-malice.

• Lawyers relate, the case of a French man, who to prove Adultery against his wife, did geld himself, and did let witnesses see he was gelded, where-upon his wife being with child 15. Months thereafter was pursued by him for Adultery : but since this was an unlawful mean of probation, I would not have allowed it, if the pursuit had been at the Husbands instance, and though it had been at the Fisks instance, yet since the woman was so much tempted, I would only have punished her moderately.

VII. Adultery is ordinarily committed so privately, and so removedly from all witnesses, that the Law allows it to be proved by strong and violent presumptions, as the being in bed together alone, and being naked, *Farin. quest. 136. cap. 1.* And the ordinary presumptions probative in this case are, the being oft alone together, gifts, love-letters, closed doors, the Wives being abroad all night, *nudus cum nuda, & solus cum sola*, the intertaining persons that are known to be Pimps, cohabitation, all which are presumptions, which according to the opinion of the Civilians, may infer torture, though it be not used with us, yet it is most ordinary for Assizes to fyle Pannels upon those presumptions, with the assistance of any other probation ; and in *George Swintouns* case, a woman was there filed of adultery, though nothing was proved but that the parties were alone, and that the witnesses heard them in bed together, and the bed shake : And in the case likewise of *Elizabeth Muir*, it may be seen that she was condemned upon pregnant presumptions, without a formal probation.

Albeit women cannot be admitted witnesses, yet they are received in adultery, as in the foresaid Process against *Elizabeth Muir*, anno, 1668. and the Lords of Session after solemn debate, found that two witnesses seeing successively the crime committed, though they did not see it at one time, yet they were sufficient witnesses to infer the Crime ; albeit it was alledged they could not be called *contestes*, Feb. 1666. Lady *Miltoun* against the Laird.

Adultery may be pursued either Civilly to obtain a Divorce, or Criminally, and when it is pursued Criminally the pursuit tends either to a capital punishment, or an extraordinary and arbitrary punishment, and according to the different nature of these conclusions, require different probation, for in civil pursuit, Lawyers do allow, and the Commissaries have found in the foresaid case of the Lady *Miltouns*, that Witnesses deponing that they saw the persons lying together naked in a bed, and that one Witness deponing upon an Act at one time and another upon another Act committed at another time, did prove sufficiently, vvhich (as some think) vvhould hardly have been sufficient in a Criminal pursuit, seeing in effect these Witnesses were but single Witnesses, and their

their senses did not here agree in one and the same object, which is the reason why witnesses are believed.

VIII. It may be doubted here whether a Decreet of Divorce before the Commissaries be sufficient to prove Adultery in a Criminal pursuit, as a Decreet of improbation before the Lords, is sufficient to infer falshood: And for clearing of this question, It is answered, that, 1. Seing the probation of Single adultery is sufficient to infer a divorce, it followes necessarily that the production of that Decreet cannot prove notour Adultery. And this was likewise found *ult. July* anno 1598, in an Action pursued by the Kings Advocat against *Alexander Hay of Dalgety*: And certainly there was great reason for that verdict, seing as it is very well urged there, many probations will infer single Adultery, or a Divorce, which will not infer notour Adultery and capital punishment: but yet I see no reason why a Decreet of the Commissaries should not infer the punishment of ordinary Adultery, and an arbitrary punishment; seing no probation is sufficient in the one case which cannot be allowed in the other, It being a rule among the Doctors, that *causa civilis & criminalis quoad partem arbitrariam aequiparantur quoad probationem*: And whereas it may be objected, that probation in Criminals, should be led in presence of the Pannel, and the Assize. To this it is answered, 1. The Decreet of Divorce is approbation. 2. This may be likewise objected in the crime of falshood, and yet the Lords Decreet is there admitted; but betwixt these two Decreets there is this difference, that the Lords may punish falshood themselves, and so their Decreet should be a full probation, because they are Judges competent, even to the Criminal part: But it is not so with the Commissaries, who can inflict no Criminal punishment at all for Adultery.

IX. The Civil Law did excuse a man from Adultery, who apprehending upon just Reasons that his Wife was dead, married another, or the Wife who married a second Husband, *l. 11. §. 12. ff. h. t. mulier cum audisset absentem virum defunctum esse alii se junxit, & falsis rumoribus inducitur, & quia verisimile est deceptam eam fuisse nihil vindicta dignum videri potest, & l. pen. dicit adulterium sine dolo malo non committi*: Upon which arose a great Debate, *Novemb. 7. 1673.* For *John Frazer* being indicted for notour Adultery with *Helen Guthrie*, alledged, that he could not pass to the knowledge of an Inquest, as an Adulterer, because he had married this *Helen* lawfully, after he had got Testificats upon Oath to prove that his first Wife was dead in *Virginia*, whereupon he got a Warrant from the Presbytery of *Edinburgh* to marry, and was accordingly Proclaimed and Married: And if a false Rumor was sufficient to clear from Adultery, and that there could be no Adultery without Dole, and a fraudulent design, as is clear by the former Laws, and by *Farin. de delict. car. quest. 140.* he could not be guilty of Adultery who had married, *Authore Ecclesia*, who is Judge competent, and who was induced thereto, not only by Report, but by Testificats. To which it was replied, that he is an Adulterer who lyes with another Woman whilst his Wife lives; and as Rumors cannot dissolve Marriage, so neither can they defend against Adultery, and if this were allowed, it were easie for every man who were weary of his Wife, to raise Rumors concerning her death, and thereby authorize himself in marrying another. 2. Though Rumours were sufficient, they behoved to be Rumors constantly and commonly reported, but here was only one Testificat, and this Testificat could be no Warrant, since it was but a single Testimony, nor did it bear that the said *Margaret Haisly*, who died there, was known to him to be Spouse to *John Frazer*, but only in general, that one *Margaret Haisly* died there, and there might have been more of that Name. 3. Though Rumours might excuse, yet that could only be after a long Absence, & *longo tempore transacto*, as is clear by the Law cited



by the Pannel, whereas here she was only absent three years; and the Ignorance behoved to be invincible, whereas here it was only *ignorantia affectata*, for it is offered to be proved that she stayed within twelve Miles of the Pannels Fathers House, and was known by all the Countrey to live there, and though her Mother, and Relations lived at *Edenburgh*, in one Town with the Pannel, yet he never asked at her Mother if she was dead. 4. A man whose Wife diverts from him, ought to summond her to adhere, and so procure a Divorce by the Commissaries; and though Rumours and Presumptions could infer a full Probation, yet that must be only understood of what is led and proved before the Judge Ordinary, and the Warrant of the Presbytery is not sufficient, since they are not Judges competent to the dissolution of Marriages, and this was procured *periculo petentis*, no person being cited. Upon which Debate, the Justices repelled the Defence, and the said *John Frazer*, being remitted to the knowledge of an Inquest, was found guilty, but did thereafter procure a Remission; and thus it is clear that *Bigamie* may be also pursued as notour Adultery. But the Woman who knew not the first Marriage was not punished, *ὅτι οὐκ ἔγνω τὸν ἀντὶ τῆς πρώτης γαμίας αὐτῆς ἐχόντα ἄλλον γαμίου τὸν δεύτερον.* *Basil. l. 85. hoc tit.*

X. It may be here doubted likewise, whether a Pursuite being intended for notour Adultery, and not for single Adultery, and the probation which is led, be sufficient to infer single Adultery, though not notour Adultery, if the Affize should fyle or not. For the Negative, it may be alledged, that single and notour Adultery are different Crimes, and the Libels are different, and the Libel in this case is not proved, and therefore the Affize should not file, and if they do, their Sentence is null; even as in the case of *George Grahame*, where the Verdict of the Affize was reduced, because Theft was libelled and receipt of Theft only proved. As also in that case the Defender is precluded of his Defences, because he would have propounded Defences against single Adultery if it had been lybelled, which would either not have been relevant against notour Adultery, or else he thought himself, *in tuto*, not to propone them, because he thought himself secure, knowing that the notour Adultery libelled could never be proved: and it is an ordinar Conclusion amongst the Doctors, that *si in libello qualificato, omnes qualitates non sint probatae, reus est absolvendus*. And albeit for eviting this Difficulty, the conclusion in thir Libels uses to be alternative, yet I think that the Defender should be absolved, he taking Instruments upon the Libel as it is libelled, except the Qualities be expressly proved; though it be most ordinary to the Justices to allow the Parties to declare that they insist alternatively as said is.

By our Law, such as are Divorced for the Crime of Adultery committed by themselves, cannot thereafter marry the persons with whom they are declared by the Sentence of a Judge to have committed Adultery, and all such Marriages are declared null, by the *Az. 22. P. 16. 7. 6.* Which hath been introduced by our Law, not only as a punishment of the Adultery already committed, by lessening and narrowing their Choice: But likewise as a Mean to hinder any from committing Adultery, in expectation (as it too ordinary) of enjoying in a future Marriage the persons with whom they have committed it. And upon which expectation, the Adulterers may be probably tempted to kill the lawful Husband or Wife of that person, with whom they have committed the same. In which our Law agrees with the Canon Law, by which *non licebat ducere eam in uxorem, quam quis polluit adulterio*. But it must be observed, that this only holds where there was an actual Divorce upon the Adultery, prior to the Marriage. And therefore a present Marriage could not be dissolved, by offering to prove, that the Contractors had committed Adultery during their former Marriage.

This

This Act of Parliament having declared such Marriages unlawful, it did very consequentially declare, the Succession to be begotten by such unlawful Conjunctions, to be unable to succeed as Heirs to these Parents. And I have heard it doubted, whether they were capable to receive Dispositions from their adulterous Parents. But I conceive as to this there is no difficulty: For though the Law make them incapable to succeed as Heirs, yet it does not make them incapable to receive a Disposition: and though it may seem, that this might be a farther check upon the Adulterers; whose Children could no way be gratified by those with whom they committed the Crime. Yet since *quilibet est arbiter rei sue*, it were hard to deprive a man of the use of his Property, because he has committed Adultery.

I find that by the Civil Law such Bastards as were born in Adultery, or Incest (whom the Civil Law calls *nati ex damno coitu*) could neither succeed to their vitious Parents, nor were they capable of any thing by their Parents Testament, *cum ita facilius paterna libido coercere posses censeatur* l. Fin. C. de nat. lib. Bald. ad l. 1. C. de jur. Aur. Nor could they be adopted by their Parents, l. legem C. de na. lib. Upon which Principle our Parliament has been induced to make the 117. Act. Par. 12. Ja. 6. but has stretched it a little further, than the Civil Law did. For by that Statute, a Woman divorced for her Adultery, marrying thereafter the person with whom she committed the Adultery for which she was divorced: or Dwelling and resorting in Company with him at Bed, and Board, cannot dispoise her Lands, or set Tacks thereof, in prejudice of the Heirs, who would otherwise have succeeded to her.

From which Statute it is observable, that since the Woman is only incapacitated to dispoise in this case; that therefore a Man though Divorced for Adultery, may lawfully dispoise his Land, in favours of the Children procreat in that Adultery, this prohibition being restricted to the woman, because of the Imbecility of her Sex, who may be tempted, or seduced, more easily than men can be: And yet since the Presumption did only run against the Adulterous Children, procreat in the second Marriage, whom it was probable the Mother would have preferred to the Children of the first, and slighted Husband. It seems strange, why any Deed done by her, in prejudice of not only those Children, but even of any of her Heirs: would be null, though done in favours, of neither the adulterous Husband, nor his Children; but even in favours of meer Strangers, whom the Law needed not have suspected. But this was certainly done to prevent the Mothers fraudulent Conveyances, who might have transmitted the Estate to the adulterous Husband, or his Posterity, or Friends under borrowed Names, the discovering of such contrivance being very difficult, and the hazard of not discovering being very great. I conceive likewise for the same reason, that the granting of a personal Bond upon which the Estate was thereafter comprised from the Mother may be quarrelled upon this Statute. For else the Law might be easily cheated: and the Statute it self declares all Deeds done to the prejudice of the saids Heirs directly, or indirectly to be null; and yet since the Mother remains still Fiar, notwithstanding of this Prohibition; I see not why a Bond, and Compyring led thereon for Debts truly owing by the Mother, could be quarrelled, where nothing was fraudulently designed against this Act. And though this Act be only conceived in favours of the Heirs of the prior Marriage, or the Womans Heirs whatsoever: yet I see no reason, why this Act would not militate in favours of the King, to reduce Deeds done to his prejudice as *ultimus Haeres*, since a last Heir in the Construction of Law is a true Heir.

## TITLE XVIII.

## Bigamie.

- 1 *What is Bigamie by our Law, and how punished.*
- 2 *Why Bigamie was not punished as Adultery.*
- 3 *Whether Quakers may be punished for Bigamie.*
- 4 *Whether long absence may excuse in this Crime.*
- 5 *Whether the Marriage fine concubitu infers Bigamie.*
- 6 *Whether a Woman divorced for Adultery, marrying again, be guilty of Bigamie.*

**T**Hat a Man might marry two Wives, was allowed by many Nations, and Tacitus observed, that only the Germans amongst all the Nations were content with one; but no Nation allowed, that a Wife should marry two Husbands, which was done, either because men were the only Legislators, and so were kind to themselves, in allowing themselves that Liberty they denied to poor Women, or else this was not allowed, because a Womans marrying two men prejudged the Peopling the Commonwealth; Whereas a mans marrying moe Wives, was advantageous for it. And the Law sayes, that more Chastity is required in Women than in Men, and Men being by Nature hotter than they, *Bigamie* is therefore more unnatural in Women.

I. Yet in our Law, either a Man marrying two Wives, or a Woman marrying two Husbands, commits Bigamy; and this is accounted by the 19. *Act. 5. Par. 2. Mary*, a breach of the Oath made at Marriage, and therefore is punishable as Perjury, by Confiscation of all their Moveables, warding of their persons for year and day, and longer during the Queens Will, and as infamous persons, never to bruik Office, Honour, Dignity, or Benefice in time coming.

II. It may be here doubted, why Bigamie was not punished as Adultery, seeing it may be notour adultery, and is ordinarily so: to which difficulty, I think the answers are that it was contraverted amongst Lawyers. whether Bigamie was punishable as Adultery, or as *Stuprum*, or *Fornicatio*; that it was not Adultery, they contended, because God allowed Bigamie, but he never allowed Adultery. 2. Many Nations allowed Bigamie, who condemned Adultery: and 1. 2. *C. de incest. nupt.* where it is said, that *nemini licet duas uxores ducere*; the punishment of Adultery is not subjoyned, but it is only said, that *præses provincia hoc inultum non patietur*, and it may be added, that their marrying shows some more respect to the Law than Adultery, & *ob figuram matrimonii multa non adeo puniuntur*. 3. When Bigamie was by this Act declared punishable, only as perjury and not by death, even incorrigible and manifest adulterers were only punishable by confiscation of their moveables, is clear as by the subsequent Act, and the Act against notour Adulterers to be punished by death, was not made till the 9th. *Parl. 2. M.* I know, that *Menoeh. de arb. cas. 420.* thinks that Bigamie should be punished as Adultery. And I do think, that if the marriage be contracted, upon design to palliate the Adultery, it should be punished more severely than Adultery; and though the offender



offender cannot be punished by death, as a Bigamist, yet he may be punished with death as a notorious adulterer. The same may be likewise said, if the persons marry against express Prohibition of the Church, or it may be of friends, for thereby they are put *in pessima fide*, and want the advantages arising, *figura matrimonii*; and this Statute punisheth only simple Bigamie, which was possibly contracted, when the wife believed the Husband to be dead, or *contra*, or when there was some other pretext for it, but excludes not a further punishment due from other circumstances, or complex Crimes. And it were absurd to think, that incestuous persons, being forbidden to marry, because of their contingency in blood, or affinity, should not be punishable for Incest.

III. It may be doubted, if Quakers can be punished as perjurers, seeing they give no Oath at marriage, and certainly they should; seeing marriage implies a Vow, though no implicit Oath be given.

IV. The Husbands long absence may be a cause why the punishment may be mitigated, but takes not a way the Crime seeing death and not time dissolves marriage. And I remember of a Minister, who was deposed for marrying a mans wife, after he was sixteen years absent, and albeit the first husband came home, yet the second Husband still retained the wife, which certainly was Adultery in him, after that knowledge, that she was, another mans wife; seeing he wanted that pretext, for which Bigamie is not punishable as Adultery. From which likeways, that general conclusion may be drawn, that when the Bigamist knows that the other person is married, if he continues, he commits Adultery, and if he know that it is incestuous, he commits Incest.

V. It may be doubted also, if two persons marrying, be guilty of Adultery, *eo ipso*, that they marry, though because of any interveining accident, as death they bed not, and seeing by the second marriage, they gave contrary Oaths; certainly they are guilty of Perjury; for Perjury being the *medicum peccati* in this Crime, and not *copulatio*, or *coitus*, as in Adultery, *reatus contrahitur per contraria vota*, and he who lyes with another mans wife immediately after they come from Church, though before she hath bedded with her husband, does in our Law commit Adultery, which shews that marriage is contracted with us *per isopoloyiam*, or *benedictionem Ecclesie & ante coitum*. And if after coming from Church the persons are married, certainly they are by that also guilty of Bigamie, and from this principle also it may be inferred, that though the first marriage was null *per frigiditatem*, or *maleficiationem*, yet the other person who might have declared that marriage to have been null, marrying another, before the first marriage was declared to have been null, tho it was null *ab initio*, will be guilty of Bigamie, because there are *contraria vota* in that case, and because he was not lawfully Divorced; for as a person who might have got a first marriage declared null *ex capite adulterii*, marrying again would be punishable, so it should be here; And if it be urged that marriages are declared *in frigidis & maleficiatis* to have been null *ab initio*, and therefore there having been no marriage at first, the second was no Bigamie, and the first Oath not binding *ab initio*, for it was given upon the supposition that the other person was *habilis* to contract a marriage, that vow was null, and therefore there were no contrary vows in this case. It may be answered, that the Law considers that first marriage as a sufficient marriage till it was declared null, and the other person who might have got the marriage declared null, would have been punished as an Adulterer if she had lye with another, *ergo*, she may be likewise punished as a Bigamist.

VI. The Act adds, *except the person were lawfully divorced*, From vvhich two questions may arise, 1. Seeing the party guilty cannot marry. v. g. If a woman be divorced for Adultery she cannot marry. *Queritur*, then if she

marrying again, may be pursued as guilty of Bigamie, and it may be alledged that it is not Bigamie, seing the act sayes, that if persons not lawfully Divorced marry, they commit Bigamie, *ergo à contrario*, vvhhere the persons are lawfully Divorced, they commit not Bigamie, nor doth the Law speak any thing of the difference betwixt the nocent and innocent parties. 2. if a person be divorced, and thereafter he marry, albeit thereafter that decreet of Divorce be reduced, certainly the other party vvho married the person divorced is not punishable, except the Decreet vvhere reduced upon his fault, but the first Decreet of Divorce being reduced upon his fault vvho obtained it, as if he had bribed the Witnesses or Judges, &c. *eo casu*, it may be alledged that he knew that the first marriage vvvas not lawfully dissolved, and so the second marriage was Bigamie, *quod him*, albeit upon the other hand it may be debated, that the first marriage being dissolved *authore pratore*, it was no marriage at the time the second marriage was contracted, and so not Bigamie, albeit the briber or forger may be punished for the crimes so committed.

## TITLE XIX.

### Theft.

- 1 The Definition of Theft.
- 2 In what things can Theft be committed, and whether it can be committed in commodato & societate.
- 3 The Law of Burden-sack, or Theft committed for necessity.
- 4 Whether the taking things belonging to no Man, be punishable as Theft.
- 5 The division of Theft, in *furtum manifestum* & *non manifestum*.
- 6 Whether Theft ought to be punished by death.
- 7 The punishment of it by our Law.
- 8 How three consecutive Thefts ought to be punished, and how inferior Judges proceed, in judging Theft.
- 9 How the Justices proceed, in judging this Crime.
- 10 How Hareships, or Abigeatus is punished.
- 11 How Sacrilege is punished.
- 12 Theft in Landed-men is Treason.
- 13 How Theft is aggravated from frequency, Time, Place, and other Circumstances.
- 14 Several Exemptions of Theft.
- 15 Statutory Thefts, such as breakers of Yards, stealing Fishes out of Ponds, Bees, &c.
- 16 Art and Part of Theft, how punished.

Albeit at first, every thing was made common, so that then there could be no Theft; yet since by the common consent of all Nations, property is introduced, Theft was forbidden as an enemy to this property, and as destructive to that order and method, whereby God resolved to govern the World: and therefore the Basilicks observe, that this Crime is against the Law of Nature, *ὅτι κτήνη καὶ τὰ φύσιν ἐκείνη ἐκινεῖται*.

I. Theft is defined by Lawyers, to be *fraudulosa contractio lucri faciendi gratia vel ipsius rei, vel etiam usus ejus possessionis, vel quod lege naturali prohibetur*.

*utrum est*, §. 1. *Inst. de obl. ex del.* By the word *Contractatio*, they understand, not only the away taking of a thing, for Theft is committed, by concealing what was taken from another; but likewise the using of a thing deposited, or impignorat to other ends and uses, than was agreed upon: therefore Theft may be described, to be a fraudulent away-taking, or using what belongs to another man, without the owners consent.

II. Theft is only committed in Moveables, and thence it is, that by the Law of England, the stealing Writs, which concern Lands, or Lead from a house, or Fruit with the Trees whereon they grow, is not punishable as Theft, seeing these things belong to Heretage. Nor is the taking away Dogs, Birds, or such things as serve for pleasure, accounted Theft, seeing it is not committed *ob lucrum*, Bolton. cap. 20. and Theft is never committed without fraud. And albeit by the Civil Law, the keeping of a thing lent, longer than the time allowed, or imploying it for another use than that for which it was first lent, be Theft by the Civil Law, *just. de furt. autem*, yet in our Law it is not, l. 3. *Reg. Maj. cap. 9. num. 5.* and the reason there given is, because the intromission, and possession there, flowed originally from the Master. And albeit it be a rule in the Civil Law, that *initium a-nis cuiusq; actionis semper est attendendum*: yet the former reason is not valid, because when a master gives Money to his own servant, if he imploy it to any other use, than is appointed by his master, as if he should drink that which was given him to pay his masters Merchands, or if he should sell his Masters horse, with which he was sent to a friend; these misimployments would certainly infer punishment, though the possession flowed originally from the Master. And I think that Theft, in the case of a misimployed lend; & the other cases above exprest, is more heinous than ordinary Thefts, seeing it is aggravated by the breach of Trust, or Friendship, and it can likewise be less guarded against: For which two reasons, Domestick Theft is still more heinously punished, than ordinary Theft; and servants committing Theft in the cases foresaid, are hanged in these Countreys, where ordinar Theft is not Capital. But I believe, the reason of our Law above cited, is, because we thought that this *furtum interpretativum*, deserved not to be accounted such with us, where death is the punishment of Theft. Whereas, because in the Roman Law, Theft was less severely punisht: it was therefore allowable, that it might be more extended; and so I think that our Law is more just than the Civil Law. And even according to the Civil Law, it were unjust that the person to whom the thing was lent, should be guilty of theft, for using it longer than was prescribed by the lender, except the lender had expressly required it; for else by not requiring it, it seems that he hath tacitly consented to the farther use, *sicut intacitare locatione*: and yet it may be answered, that there is a difference betwixt *locatum* & *commodatum*, as to this, seeing *locatio contrahitur utriusq; gratia & locantis, & conductoris*, whereas *commodatum respicit tantum commodum commodataris*, and so he should religiously observe the conditions prescribed by the lender; but yet I am clear, that if a person should borrow any thing, at first for an other use, than what he pretended, that *eo casu*, he is punishable. And I remember to have read of a Banquier at Paris, who was flea'd, and then quartered, for having borrowed vast sums, upon design to break with it (which instance I have set down for the Merchants of our times) and seeing the lender is as much wronged, and the seeker of the loan shews as great fraud by this pretence, as in other Theft: I see not why the punishment should not be the same. I find it observed by Bolton. cap. 31. that though in Glanvells time (who is reputed to be author of *Regium Maj.*) *a furtis omni modo excusabatur qui initium habuerit sua detentionis per dominum illius rei*, yet it is not so now, for if a Carrier take out a parcel of the things delivered to him, and sell it, he is guilty of Theft; but it



is not Theft in the Carrier to give a way, or embezzle the whole as he received them, because it was delivered him in the same kind, *Strawf. 25*. But this last part seems absurd, for the offender designs equally to offend and the proprietor is equally injured in both cases. It is doubted by Lawyers, whether Theft can be committed by one of these who are in a society, or who have right to a common-ty of these things, which is the subject matter of the common-ty. It is answered, that it can, if fraud be proved in either of these cases, *l. si socius ff. de furto* and the reason is, because the using that which is common, or that as in which the Society is constitute; otherways than according to the rules, is in effect to imploy for ones own use, vvhhat belongs to another, which is Theft; and who doubts, if one of these vvho is in a Society, as in Beer brevvng, vvould steal avvay in the night, considerable quantities of Beer, out of the Society, but he might be punished for Theft, *καὶ τὸν μὲν ἀλλοτρίοις τῶν κοινῶν πραγμάτων οὐκ ἐκ τῆς τοῦ κοινῶν ἀπορίας. l. 46. Basil. b. 1.*

III. According to the Law of *Burden-sack*, or *Ibur ana seca*, no man can be accused for Theft, for as much meat as he can carry on his back, *R. M. l. 4. cap. 19*. But I think this should be restricted, by these two limitations; 1. If the said Theft vvas committed, to satisfy his necessity, *l. verum ff. de furtis*, vvwhich is the meaning of that expression, necessity has no Lavv. And 2. if he could not intertain himself another vvay. And vvhereas *Skeen* observes upon the word *Burden-sack*, the Thief should in this case, pay a Cow, or Sheep to him, in whose Land he was taken. I think that also unreasonable, seing that presupposes, that the Thief is not in that absolute necessity, which should get him this privilege: and whereas he observes, that he should be scourged, I think it most unreasonable, because his necessity, makes it in effect, to be no Theft: and it is contrair likewise, to the foresaid *16. cap. l. 4. Reg. Maj.* that no Court shall be holden upon *Burden-sack*. By the Civil Law likewise, *fraudantes fiscum*, or *gabellum*, the stealers of Customes were punishable as Thieves *Far. quest. 173*. but of this I shall treat hereafter.

IV. By the Civil Law it was accounted no Theft to intromet with, or abstract things that belonged to a succession, to which none had entered; because, before the entering of an Heir, these things could be called no mans, *l. Hereditarie ff. de furto*. And for the same reason, the taking away Rings, and other Goods from off a dead person, out of a Grave, is not counted Theft by the Law of *England*, as it was found in *Notinghames* case, anno 1617. where this was only found a misdemeanour, and the defender whipt: but this holds not now in our practise, vvwhich is most reasonable, for this is in effect greater than ordinary Theft, because these things have none to guard them. And in our Law likewise, he vvho finds a waife Beast, vvwhich hath strayed from the owner, should cause cry it either in the Court of his Over-Lord, or in the Church, or else he may be pursued for Theft; and Theft is likewise punishable, albeit the person be not known, from vvhom the thing vvvas stollen, *Alex. Concilio 23*. And yet *furtum non fit nisi fit cui fiat*, *καὶ οὐ γὰρ ἐγίγνετο μὴ οὐκ εἶναι τὴν ἀποπῆν οὐσιασμένην. l. 43. §. 5. basil. b. 1.*

V. Theft was divided by the Civil Law, in *manifestum* & *non manifestum*; Manifest Theft, was when the Thief himself was deprehended, in the very Act, or if he was seen with it before he did arive at the place, to vvwhich he did destinate to carry it. Theft not manifest, was, when either the Thief was not taken, or seen with it: and this distinction hath in my opinion, given occasion to the difference in our Law, betwixt Infang-thief, and Out-fang-thief, vvwhich concerns only the Jurisdiction vvwhere the Thief is punished, but not the punishment it self, as shall be said hereafter; but there are several other Vestiges of it in our Law, as *cap. 21. l. 4. Reg. Maj.* It is said, that he vvho is taken vvith nothing in his hand, may purge himself by 27 men, and three Thanes,

Thanes, and a Burgels being accused of Manifest Theft, may purge himself by the Oath of twelve; the meaning whereof, is, that he shall give his own Oath he is innocent, and shall get so many Men to swear, that they believe his innocence, and this manifest Theft, is called Theft with red hand, *Stat. Orcar.* by a Metaphor borrowed from Murder. But with us, Theft may be divided into common Theft (which is Theft so properly called, or Stouth-rise, which is violent Theft) and is a complex of Theft and Robbery. And receipt of Theft, which distinction is hinted at, in all our Laws, but most specially 50. *Az. P. 1. l. Ja. 6.*

VI. As to the punishment of Theft, it is much contraverted amongst Lawyers, if the Law-givers can justly punish Theft with death, and though I will not dispute the Power of Princes and States, yet I incline to think, that for simple Theft, a Thief should not die. For first, we find by the Law of God, to which as the Scripture sayes, nothing should be added, or paired, Theft is not punishable by death, nor can this Law be called only a Judicial Law fitted for the Common-wealth of the Jews: For that it is a Moral Law, according to its statutory part, forbidding Theft, appears from its being insert amongst the Commands, and why it should not be so, as to its Sanction, and punishment like Murder, Incest, and these other Crimes, I cannot see a Reason. 2. We see that some Thefts are capitally punished, as are the stealing things Sacred. *Josh. 7.* And theft committed in the Night, *Exod. 22. 2.* and stealers of Men, *Deut. 21. 7.* By which it appears, that God Almighty intended not that single Theft should be punished by death. 3. There is no Proportion betwixt the life of a Man, and any Money, for all that a man hath will he give for his life. 4. The life of the Malefactor is ordinarily taken, where the Crime cannot be repaired, as in Murder, Incest, &c. But in Theft it may, and the Parties wronged, would in all probability, be far easier secured this way, seeing many will rather want their Goods than have a Mans life taken. Many Thieves would restore, if they thought Restauration might be made with safety of their life; and the Law would easilier sustain the Pursuers probation, if the Event were only to reach Goods, and not Life. 5. It seems absurd, that single Adultery, which is the worst of Thefts (seeing the Husband thereby is robbed of his Estate, Quiet, Good-name, and Succession) should not be punishable by death, and yet Theft should be made Capital, and that Theft and Murder which are not equal Crimes, should have equal punishments. And albeit it be objected, that *Laban, Gen. 24. 9.* did vow that these vvho had stolen his Goods, should be punished by death: Yet the reason in that case vvill appear to be, because that the Theft there mentioned, vv as Sacrilege. And whereas *David's* Oath to *Nathan*, is, that he vvho had stolne his Neighbours Lamb, should die, is objected. It is answered, either that vv as spoken in passion, vv which the Text bears; or other vvays that vv as suggested by a special providence to *David*, to the end he might be his ovvn accused. Nor do I deny but there vv as a kind of Communion of Goods amongst the Jevvs, more than in other Nations, as appears by their Jubelee, by their not taking Pledges, nor Annualrent, so that there vv as less reason to make Theft capital amongst them, than amongst us, and that according as Crimes grow more frequent, the punishment may be augmented, but I deny that they should be so augmented, that suitable Proportion should not be kept. And it is known from experience, that many men fear hanging, less than being constantly kepted in Correction houses, or in the places where they may be kept working, as they do in *Holland*, for the good of the Common-wealth.

VII. To descend then to our Law, the Custom is, that the Justices do sometimes hang even for very small Faults, as *Thomas Neilson* for stealing

a Horse, 10 Decemb. 1661. *Watson* hanged for stealing 40 Sheep, though there was no probation against him, but his own confession, and though he had restored the things stolen. Sometimes by banishment, as *Richard Lauder*, 6. Febr. 1639. and *Alexander Cumming*, and *John Tailor*, 25. Febr. 1639. Sometimes they are Drowned, as *Griffel Mathow*, for stealing a Coffe with Writs, 23. June 1599. Sometimes Scourged, as *James Wilson*, 7. Febr. 1608. Sometimes they are hanged in Chains, if they be notorious Thieves, As *Patrick Roy Macgrigor*, May. 1668. &c. It is thought that *de jure* there is no Law in Scotland for hanging a man for Theft, which is a great mistake, for *Leg. Burgorum. cap. 121.* It is said, if a Thief be taken with Bread worth a Farthing, and from one Farthing to four, he should be Scourged: For four Farthings he should be put in the Joggs, and Banished; From four to eight he should loose an Ear: And if that same Thief be thereafter taken with eight Pennies, he should be hanged; but if any Thief should be taken with 32. Pennies and an Farthing, he may be hanged. 2. By the 7. *Art. Stat. David* 2. 13. *ch. and cap. 13. l. 4. Reg. Maj.* One defamed for Theft, who cannot find Caution, should be hanged, & *cap. 16.* It is said that no man can be hanged for less than two Sheep: and by the Law likewise of *Birthingfack*, a Thief should not die for as much Meat as he can carry upon his Back: and *cap. 18.* A Thief being hanged and falling from the Gallows, is no more to be punished. All which implyes clearly that Theft is of its own Nature punishable by death. 3. By the 82. *Art. J. 6. P. 11.* Stealers of Plough-graith, or Breakers of Milns, are to be punished therefore, to the death, as Thieves. But because our Practiques, is in this, a little arbitrary and uncertain, it will be fit to know that Theft in Scotland, is either pursued by Accusation, which is at the instance of a privat Accuser, or by way of Inditement, which is at the instance of the Procurator-Fiscal. If the Pursuit be intended, by way of Accusation, it may be judged by Barons having power of Pitt, and Gallows, or as our Charters call, *Fossa & Furca*, or by Sheriffs: but if it be pursued by way of Inditement, the Cognition thereof belongs to the Justice. *Leg. Maj. cap. 1. Num. 7.* But this distinction is not well observed, for the Sheriffs do proceed to judge Thefts even by Citation, and though the Thief be not taken with the Fang, which is certainly an Error, for all Process upon citation against a Thief, should belong to the Justices.

VIII. In the procedure before these inferior Courts, they do not condemn to death, except upon three Thefts, or that the person be taken with Fang, and he be likewise *famosus fur*. As to the three Thefts, I find no express Law for it only, *Stat. Da. 2. cap. 17.* Where it is said, if a Thief be defamed at three Barons Courts, and wants a Pledge, or Cautioner, then he may be hanged, or if he be defamed, and cited in two Courts, or in one, and be of ill Fame likewise; or as we say, there be publick Bruits and open Fame that he is a Thief, then he may be hanged. But simple Fame is said there, not to be sufficient to infer death, except that ill Fame were found by an Affize upon Oath. Yet this is now obsolet, for fame is in no case sufficient to infer death.

As to three Thefts, I find the Civilians relate, that the third Theft, by the statutory Law of most places, is Capital, and it seems to be grounded upon very good Reasons, for he who is oft found committing the same Crime, is presumed by the Law to design to make it a Trade, *Ang. ad l. 8. de vi publica*, where the committing of Theft twice, inferrs this Presumption. The Law of Holland provides, that a Thief shall be hanged for the third Theft, except it seem otherways just to the Judge because of his Age, or any other pregnant Reason: and ordinarily three small Thefts, are by *Matheus* said not to be construed such, according to the Law of Holland, as deserves death: the Civilians



liansdo upon Supposition that the third Theft is Capital, conclude, that these three Thefts should be distinct, even as to the time, and that he is to be punished with Death for the third Theft, though he had been formerly punished for both the other two, or though the former two had been remitted to him by the Prince: And albeit they use many distinctions for clearing whether a Thief should be hanged for the third Theft, where the first two were not committed within his Territory or Jurisdiction, and so could not be punished by him, yet since capital Punishment is not inferred by a Statute against the third Theft, but that the third Theft is only punishable with Death, because the Committer is presumed to be irreclaimable: Therefore I think, that where ever the Theft was committed, yet for the third Theft, the Thief should be hanged; For albeit there be no express Statute for that with us, yet, seing *Gomesius*, *Chasancus*, and other famous Lawyers, attested this to be the general Custom of the World; I think it should be followed by our Sheriffs and inferior Judges, who being determined by that Number, have some certain Rule whereby they may be both limited, and warranted, which is much safer than that they should be allowed Scop, to break out into the Extreame of either Cruelty or Covardlines.

The Law of England divides Theft or Larceny, into petty Larceny, vvhen the thing stolen, exceeds not Twelve pence, and its punishment extends not to death, and grand Larceny, when it exceeds twelve pence, wherein the Thief is punishable by death, except he be saved by the Book: And if one steal to the Value of Sixpence, at one time, and Sixpence at another time, then he is guilty of death; but if two steal to the value of eighteen pence joyntly, each is guilty.

Common bruit, and open Fame, of being an ordinary Thief, is likewise a good ground of making Theft punishable by death, the Thief being taken with the Fang, & *hifures famosi sive infamati de pluribus furtis*, are ordinarily hanged likewise, as is clear by *Clarus. Num. 8. hoc tit. Menoch. arbitrariis Casu. 295.* And it is sufficient that Witnesses depone of their Credulity, and that they are informed by others, our Law calls such *defamati de latrocinio*; and if he cannot find Caution, the old Law appoints, that he should be proceeded against as if he were a proven Thief: For *latro defamatus* & *latro probatus*, are still *aquipollent* in our Law; But I think these Laws too severe, and they are not in use.

IX. As to the procedure of the Justices; it is because their power is more eminent, that they allowed to be more arbitrary; but I think the distinction allowed by Civilians, will be very reasonable, which is that, *in furto simplici*, in simple Theft, the pain of death should never be imposed, but in qualified Theft, if the quality be such as aggravates the Crime very much; Which aggravations are either taken from the thing it self, that is stoln, as in our statutes, the stealers of Plough-graith, cutters and destroyers of Plough, and Plough-graith, in the time of Teiling; and cutters and destroyers of growing Trees, or breakers of Milnes, or of leading Corns, or fewel, are to be punished to the death, as Thieves. 82. Að. 11. P. 7. 6. and hochers and killers of Oxen, horses, and other cattel, are punishable by death, and confiscation of Moveables, as well committers as recepters, Að. 110. p. 74. 6. and upon this act were hanged, for killing *Drumlanericks* sheep, 20. Feb. 1666. Albeit it would appear, that that act is only to be extended to labouring cattel. *Nota*, this is a case wherein Theft may be committed, without carrying any thing away; for the doing of these wrongs, without carrying away the thing wronged, is constantly declared to be Theft, & *per constitutionem Frederici Secundi de stat. §. agricultores*, the stealing Plough-graith, is punished, as a particular crime.

X. Herdships, likewise, which is, the driving away a great many Cattle, called by the Civilians, *crimen abigeatus*, is likewise by the Law of all Nations, and particularly by ours, punished with death, but though *lex prima dig. de abigeat*: say that *abigei ad gladium dentur*. Yet Mathews doth interpret, that not to be meant, *de ultimo supplicio*, but only *de ludo gladiatorio*, and with this agrees. *l. 2. το των απλατων συλλαμα παρ' αλλου μη εν ει*: But if they went with arms, they were punished with death, as the Scolia of the *Basilicks* observe. It may be usefully observed, that these who drive away Herdships, *cum gladio*, with arms, are punished by death, because they are rather Robbers than Thieves. 2. These who drive away great Cattle, are more to be punished, than these who drive away the lesser, *l. 1. ff. de abige*. 3. These are to be most severely punished, who live in a countrey, where that crime is most frequent; and therefore our *Higlanders* are most severely punished. 4. These that drive away cattle from the fields, are more to be punished, than these who drive out of the houses, because Cattle in the fields have no guard but the Law.

XI. The stealing likewise of a thing consecrated to God, aggraves so the Theft, as to make it punishable by death, and this was called Sacrilege by the Civil, and Canon Laws, and was distinguished into several degrees, as 1. if a thing Sacred was stoln out of a sacred place. 2. If a thing Sacred was stoln out of any place. 3. If a thing not Sacred was stoln out of a Sacred place: But thir two last are not properly Sacrilege. With us there are no formal Consecrations used of Churches, Vestments, Cupps, &c. and so we have no such formal crime, as Sacrilege; nor have we any act against it. Yet I think, to steall any thing destinat to Gods Service, and even to steal any thing out of a Church, deserves to be punished with death. And this theft is aggraved with us, not only from the nature of the thing stoln, but more from the place; and thus also Murder, or mutilation, committed within the Church or Church-yard, is more severely punished than other Murders; and with us these who steal out of Churches, are still hanged, or who steal what is dedicated to, or serves the Church, as Basons. &c.

XII. The next aggravation of Theft is from the person who commits it, and thus Theft, when committed by landed men, is punished with us as Treason, *Act 5c. p. 11. j. 6.* the words are, that if it shall happen any landed man to be lawfully & orderly convict of common Theft, receipt of Theft, or Stouth-reif he shall incur the crime and the pain of Treason: The reason inductive of this act was, because it was easier for landed men to commit Theft, than for any others, and so it should be more severely punished, and these also wanted all pretext of necessity, or rusticity, and must be presumed to be extreamly mean and malicious persons, whom the common wealth might well want, and whom they should not suffer: but it may be here doubted who are these, who are by this act to be accounted landed men; And it would appear, 1. That only such as have themselves, or their predecessors, been Infeft, are only such for *nulla fasina nulla terra*, and so a Disposition or charter or a resignation *in favorem*, makes not a Thief to fall under the compasse of this Act. Yet some think an Heir served and retoured, doth fall vvithin this signification, though he be not Infeft, because his lying out is his own fault, and so should not defend him. 2. I think that a person who was once a Baron, if he be thereafter denuded; falls not under it, for albeit *semel baro is semper baro* in our Law. Yet that maxime holds only presumptive; and if it be proved that he was actually denuded, that will liberat him from vitious intromission, much more a crime that deserves forefaulter, and statutory crimes are not to be extended. By ordinary Theft in this act is meant, Theft without any aggravation of violence, heirships, &c. by stouth-reif is meant violent and masterful Theft. And as this

this kind of Theft hath the disadvantage of being Treason, so it is just that it should participat of all the advantages which are allowed to those who are pursued, as Traitors, (*Et quem sequuntur incommoda cum debeat sequi commoda*) and therefore no inferior Judge is Judge competent to a process founded upon this species of Theft, as was found in July 1668. where a process intended against a landed man, before the Sheriff of Wigton, was Advocat to the Justices upon this reason: albeit it was alledged that this act being conceived *in odium*, and for repressing of Theft, it was unreasonable that it should not be quarrellable before every Judge, for thereby many would be deterred from pursuits against landed men. And albeit the punishment was in this Theft greater than in others, yet the relevancy and probation was no more intricate here than in other cases. It was alledged that the pursuer restricted his Libel to ordinary Theft, which the Justices found he could not do, because the relevancy, and probation would be, *eadem utrobique*, and albeit the party would restrict as said is, yet the Kings Advocat might, at any time thereafter, found a Process of forfeiturer, and needed no more probation, as in the case of John Wauch, though the Sheriff of Selkirk had only fined the Thief, yet the Lords sustained a Declarator of Escheat upon that same verdict, whereby the Thief was found by them guilty of Theft; for the Lords thought that private parties could by no declaration nor deed of theirs, prejudice His Majesties interest, so that from this ground, it may be debated, that when a landed man is pursued for Theft, the pursuer cannot restrict his pursuit to a pursuit of common Theft. As also, that the pursuer failing to prove, in this case commits Treason, because he who pursues any man for Treason, if he be found calumnious, commits Treason. It may be doubted also if the Council can mitigate the punishment here, seeing they cannot remit Treason: Yet in their Statutory Treasons the Council ordinarily mitigates or converts the punishment. Nor see I any reason, why it may not be alledged that Theft in landed men, is not made Treason by this Act, but is only declared punishable as Treason, and Theft, that is not to be judged as Treason, though it should be punished as such, for these two are different.

XIII. This crime of Theft becomes sometimes atrocious, and so should be punishable by death, because of the irreclaimableness of the offender, and triple Theft is capital in inferior Courts, though the things stolen be very inconsiderable, because this shews a habit or double Theft, if the thing stolen be of great moment. And by the first statute, *Da. 2. §. 4.* A Thief banished, being taken again in these Territories, from which he was banished, may be proceeded against with all severity; and the breaking of park Dove-coats, &c. is punishable by death at the third time, *Act. 84. §. 6. P. 6.*

The way likewise whereby the Theft is committed, makes it oft deserve to be capital, as the stealing by false keys, or breaking houses, and enchantments, and if it be committed masterfully, (as we use to speak) which is called *Stouth-reif* with us, and *Roboria*, by the Doctors, then it deserves to be capitally punished; but of this afterwards.

Theft is likewise aggravated from the time, as stealing in the night is punishable by death, if the Thief defend himself, and be armed. *l. furem. ff. ad l. Corn. de fcar.* but with us generally a Thief breaking houses in the night may be killed by the person invaded, *Act. 22. Ch. 2. p. 1. Sess. 1.* which may be extended also to such Thieves as are preparing to break the house, or who have done it already, and to steal any thing in the time a house is burning, or when a Ship is wrackt, or in time of tumults, or general desolation, were highly punishable by the Civil Law, either *pena fustium cum relegatione* or *in metallum*. And with us I think such Thieves should dye, for both they add affliction to the afflicted, and so shew very much malice. As also the committing



Theft is then very easy, and to these cases I may adde Theft committed in time of Pestilence.

XIV. As Theft is aggravated by these, so it is extenuat by other circumstances, as 1. In case of necessity, as said is, 2. A wife stealing from her own Husband, is not so severely to be punished as in other cases, for in effect she hath some interest, and therefore by the Common Law this was not pursuable as Theft, *sed actione rerum amotarum*, l. *qui seruo*, §. *item placuit*, ff. *de furt*. but with us, the Kings Advocat may pursue either wife or Husband stealing from one another, though the parties cannot. For it is to be presumed that there is too much malice in such pursuits, and that the pursuer designs in that case rather to be free from the marriage, than to have the crime punished. 3. He who steals from his debtor, who will not pay him, or steals what was robbed from him, is punishable, but not by death, *Clar. num. 20. de furt*. 4. He who steals a thing of small value, *de minimis non curat lex*, of which formerly, 5. If the party from whom the thing was stolen, declare that it was not a way taken without his consent; some Lavvyers think the crime is thereby purged: Which opinion others allow not except it be also proven, that there were presumptions of a prior consent, as the stealers good fame, his friendship to the party accused, the relation by affinity, or consanguinity &c. but with us if the informer swear not the Libel, and depone that the thing was stolen, for ought he knowes, the Libel will not be sustained. 6. If the taker had propable reasons, to presume the things taken by him to be his own then he is excused from criminal punishment, *ad civilem questionem transmittitur*, l. 1. §. *ult.*

XV. There are with us other Statutory Thefts, which are not so of their own nature, but are to be punished as such, as the breaking of Milns, &c. *Act. 82. P. 11. a. 6.* A Salter, or Coalyer also, leaving his Master without a sufficient Testimonial, or at least a sufficient Reason given for his Removal, and attested by the Baillie, or Magistrat of the place, are to be repute and punished as Thieves, *Act. 11. P. 18. J. 6.* But it would appear that such only as receive Fee and Wages from others, are only punishable as such, but not otherways; and really it were unreasonable, that a poor Coalyer or Salter might not leave that Trade, either to take another Trade, or for sickness, or any other cause, and that Act seems only to hinder their going from one Master to another.

Stealers of Pyks out of Stanks, Breakers of Dove-coats, Orchards or Yards, Stealers and Destroyers of Hives, are punishable as Thieves, and this is ordained to be a Point of Dittay, and the Unlaw to be ten Pound, and mends to the Party, conform to the skaith, *Act. 69. p. 6. J. 4.* But by the 33. *Act. 2. P. 7. 1.* Stealing of green Wood by night, or Peilers of Barks of Trees, should pay fourty shillings to the King, and assyth the Party, *Act. 33. 2. P. 7. 1.* But therefore by the 12 *Act. 4. P. 7. 5.* the breaking of Dove-coats, Coney-gairs, Parks, or Stanks (i.e.) Ponds, is declared to be punished as Theft; but seeing that appoints not that it shall be Theft, it may be doubted if it should be repute as Theft, as to the other Disadvantages.

I find that upon the 25. of July. 1623. Two Fellows called Raith and Deane, are ordained to be hanged for breaking of Yards, stealing of Bee-Skeps, and stealing of Sybows. By the 84. *Act. 6. P. J. 6.* The Destroyers of Planting, Haining-broom, Pollicie, are for the first appointed to pay to the owner the Avail, and ten Pound; For the second, the Avail and twenty pound; For the third, the Avail and fourty Pound; And if they be not Responfall to be put in Prison, and in the Irons for eight days; For the second fifteen days; For the third a Month; and to be scourged at the end of the moneth. By which Act likewise, the Breakers of Dove-coats, Conyng-gares

gars, and Parks, are to be punished the same way; if they be not responſal, they are to be hanged for the third fault. It is observable, that though theſe perſons abovenamed were hanged for breaking of Yards, yet there is no warrant therefor by that act, though there be for breaking of Dove-coats and Parks, and ſo we may perceive, that the former act is not abrogat by this Act. And this Act declares, that the puniſhment here preſcribed ſhall be without prejudice to call the defenders at juſtice Courts, and all the innovation introduced by this Act, is that the offender may be tryed in thir caſes, by the Baron, or Lands Lord, within whoſe Lands the wrong was committed, if the offender be taken reid-hand, (whereas Land-lords are not Judges competent) and by the Sheriff, if they be not taken reid-hand. 2. There is allowed by this Act, a power to Land-lords, to Judge in the caſe of wrongs done to their own Tenents, which *regulariter* was not lawful. It is likewiſe observable, that this and the 12. *Act. J. 5. p. 4.* adds ſtill; without the good-will of the owner. So that I think, that albeit the owners declaration be not ſufficient to abſolve the Thief in other caſes, yet I think it is in this caſe, and that for theſe two reaſons. 1. Becauſe this ſtatutory Theft, is only introduced in favours of the owners, and this claſe had elſe been unnecellar. 2. It is preſumeable that the owner would not reſuſe his conſent to kill a Deer or Coney, and this we may obſerve, that the words *invito domino*, in the definition of Theft, are not abſolutly unnecellar, as many Lavvyers carpingly obſerve, and that in ſome caſes, the conſent of the owner may defend the Party. 3. It may be obſerved from this act, that Theft ſhould be proved by confeſſion or Witneſſes, and though other crimes may be proved by preſumptions, yet this ſhould not ſeing death is ſo exorbitant a puniſhment. 4. It is observable, that the Sheriff-depute, or other Deputs, may ſit in caſes belonging to the Sheriff himſelf, and that the Declinator vvhich is ſufficient againſt the one, excludes not the other. To take Doves alſo, vvhich belongs to their Dove-coats, or to kill them, is repute Theft, *l. Pomponius. §. Pomponius. ff. fam. criſc.* and by the Doctors *Chaf. fol. 1484.* for ſeing theſe creatures are ordinarily tame novv, and that by the cuſtome eſpecially of the low Countreys there are ſevv or no vvild Doves it follovvs that it ſhould be unlavvfull to kill or ſhoot them, as it is to ſhot or hunt other vvild beaſts: the ſtealing likeways of Bees, which are kept in hives was accompted Theft, *l. Pomponius §. Pomponius. ff. fam. criſc.* and by the Law of Germanie, *Berlich. concluſ. 50.* For which though an arbitrary puniſhment ſhould be regularly inflicted, yet if the Bees ſtoln be of great value, or if the committer has been frequently deprehended in the like guilt, then the Doctors are of opinion, that even ſtealing of Bees may be puniſhed by death, *Jac. de Belloviſ. præſt. crim. Cap. 20. num. 32.* but I think our Law juſter, which conſiders more the habit of the offender than the greatneſs of the offence. Stealers likewiſe of Pyks out of ſtanks, was forbidden, but not puniſhed by the Civil Law, but by the cuſtom of all Nations, it is now puniſhed arbitrarily accordingly to the differing circumſtances, *Berlich. concluſ. 51.*

XVI. Art and part depends in this, as in other Crimes, upon circumſtances, but the ordinary rules preſcribed by *Farinacius queſt. 168.* are, 1. That he who gives counſel, or perſwades to ſteal, is puniſhable as the Thief. 2. He who aſſiſts, eſpecially if he partake of the Theft, is guilty, though he be actually preſent. 3. He who recepts the thing ſtolen by the Civil Law, *conatus*, or a deſign and eſſay to ſteal, if no Theft was committed, was not puniſhable as Theft, *l. vulgaris ff. de fur.* where it is ſaid, that he who entered another mans Cloſet upon a deſign to ſteal, if he touched nothing, is only puniſhable *actione injuriarum ſi ſine vi, vel de vi. ſi vi intravit.* And with us, I think that eſſaying to ſteal, ſhould not be puniſhed with death, ſeing the eſſayer might have repented, and ſeing *furtum eſt concretatio rei aliena*, ſo be

before he touch any thing I think he cannot be called, nor conscionably punished as a Thief. He vvho shewvs the vvay to a Thief is not a Thief, *οὐκ ἔστιν ὁ δεικνύων τὴν ὁδὸν εἰς τὴν ληστείαν*. But vvith us this might be esteemed art and part: By that Lavv li kvvise, if one broke the gate upon revenge, and another entered and stole the breaker of the gate vvould not be lyable for Theft, *καὶ γὰρ ἀνορθώματα ἀνορθῶσι διὰ τὴν ἀδικίαν τοῦ διαλύοντος*. 1.53. *Basil. h.t.* and yet I think that he vvho brake the gate vvould be lyable for the price of the things so stolln, because he occasioned by unlavvfull means the things to be stolln: Lavv has determined generally, that *ut furtum nemo facit sine dolo malo ita nec opem, & consilium fert sine dolo malo, & is consilium dat qui furtum persuadet, & is opem fert qui ministerium furto prabet*, *οὐκ ἔστιν ὁ δεικνύων τὴν ὁδὸν εἰς τὴν ληστείαν, οὐδὲ δὲ ὁ ἀνορθῶν τὰ ἀνορθώματα τῆς ἀδικίας τοῦ διαλύοντος*.

And I conceive that there is in Lavv and reason, a great difference to be put betvvixt these crimes, vvhich are only committed against our fortunes, and in caes vvhich may be repaired; vvherein actual los should be more considered than attempts, and these which are irreparable, when committed, and are atrocious, and concern the safety of our persons, wherein attempts should be highly punished.

If he whole goods are stolln, does require the Master of the Thief, or him in whose obeisance he is, or with whom he is found, to deliver him up to him, that Justice may be done upon him, the master or sustainer of the Theft, should either deliver him up, or present him to Justice, else he is guilty of the crime, and art and part thereof, *J. 5. p. 2. Añ. 2.* And albeit the word obeisance, here used, would seem to include vassals, yet it should not extend to these, seeing it is restricted by the act to masters and sustainers, and by *sustainers*, are meant such as entertain the Thief at bed and board.

## TITLE XX.

### Theft-Boot and Receipt.

- 1 What is Theft-Boot, and by whom committed.
- 2 What is Receipt of Theft.
- 3 How Receipt of Theft is punished.
- 4 The principal Thief ought to be discusst before the Receptor.
- 5 How the Husband is to be punished for what is found with the Wife, &c contra.
- 6 How Servants are punishable for the Masters Theft.
- 7 How Buyers of Stolln Goods are lyable.

**T**Heft-boot is committed by securing a Thief against the punishment due by Law, and properly it is when Sheriffs and other Judges who sell a Thief, or fyne with him in Theft-dome, committed, or to be committed. *P. 13. J. 6. Añ. 137.* And the Lord of Regality, committing this Crime, losses his Regalities and Baronies, *idest*, his Offices and Jurisdictions, as Lord of Regality, and as Barron, and the Justices, and the Sheriffs lose Life and Goods. Theft boot is also committed by any other person who takes a Ransome from a Thief, when he finds him with the Fang. 3. When a party who was leas'd, transacts with the Thief, and passing from the Pursuit which is punishable, because the publick being by the Crime wronged as well as he



he, and his Majesty having *ius quasi* to the Moveables of the Offender; it is unjust, that any privat Party should have it in his Power to indemnify the Transgressor: And albeit thir two last Species of Theft be not expressly contained in the Act, yet seing the Act bears, that Lords of Regalities, Sheriffs, nor others, shall not sell, &c. under the Word *others* generally all Transgressors are comprehended, and by the 2<sup>d</sup> Act. 1. P. J. 5<sup>th</sup> It is declared, that he who transacts with a Thief, for Theft committed against himself, shall be guilty of Theft-boot, and shall be punishable as the principal Thief, from which it appears, that the punishment of Theft-boot in privat persons, is the same with the punishment of the Thief, whereas in the first Act. P. 13. J. 6. There is no punishment statuted against private persons who are guilty of Theft-boot, only against Judges Transacting or Ransoming. *Sc. Steen, verbi Boot.* defines Theft-boot to be when any person agrees with a Thief, or puts him from the Law. And yet I remember that in Jan. 1665. *Angus Mackintosh*, being pursued by the Sheriff-Depute of *Inverness*, for Theft-boot, as he who had componed with a Thief who had stolen some Meal from him; the Lords of Session did Advocat this Pursuit to themselves, because they thought this Crime of Theft-boot in desuetude, and therefore they resolved to hear it themselves, that they might clearly determine what Theft-boot was, and how far it was to be extended.

II. The Civil Law knew not such distinct Crime as Receipt of Theft, but it was comprehended under the Definition of Theft, for Receipt is defined to be *occultatio latronum vel malefactorum ab eo qui latronem apprehendere poterat pecunia vel surreptorum parte accepta, l. 1. ff. de recept.* It is the wilful concealing or protecting a Thief by him who might have taken and apprehended him, and that either for Money, or a part of the stolen Goods, from which Definition it may be inferred. 1. That such as lodge Thieves in Inns, are not liyable for Receipt, except it be likeways proved that they knew the person lodged to have stolen Goods, which Ignorance will not excuse, if it be affected and designed Ignorance, as if all the Neighbours knew, or if it was intimar to them, or if any person offered to inform, and the Inn-keeper would not know, or if the Guest offered an extraordinary Reward, or offered to bribe Servants, or kept a very jealous Watch; Which Presumptions may infer an arbitrary punishment, but not death. 2. It may be inferred that the lodging a Kinsman, a Wife or Husbands entertaining one another, will not infer Receipt, because that is presumed to be done rather, out of Love, than avarice or *dole*, l. 2. ff. de recept. which was extended as *Chassan.* observes, *Rubr. 1. §. 5. N. 13.* to a Mistress concealing her Sweet-heart: In all which cases the Receptors are only to be excused, if they communicat not in the Theft, for else they are to be punished as Thieves, for that is not the effect of love but of fraud.

III. Receipt of Theft with us, is punishable as the principal Thief, *Stat. 21. Alex. 2.* Where it is said, that whosoever shall receipt the thing stolon willingly or knowingly, he shall be punished as the principal Thief; and from this it may be concluded, that Receipt with us, is properly, when the thing stolon is receipted, and not when the Stealer without the Theft is receipted; for as to the receipting of the Thief, it appears only to be punishable, when Letters of Intercommuning are published, prohibiting all the Leidges to receipt or fortifie a Malefactor, else Letters of Intercommuning were unnecessary; nor see I why the Receptor of a Thief should be in a worse condition than the Receptor of a Murder; and our Practise speaks still of Receipt of theft, not of Thieves, at least Receipt of this nature falls not under this special Crime, but only under the general Crime of receipting Malefactors, but if the Receptor of a Thief take Money, or good Deed, for the receipting even his person,

*occafion*, he is guilty of Theft-boon, but by the 21. *Ass. P. 1. 7. 6.* It is declared, that whosoever intercommons with Thieves, or assists them in their theifous Stealings, or Deeds, either in going, or coming, or gives them Meat, Harbour, or Assistance, or Trysts with them any manner of way, they shall be pursued, either Civilly, or Criminally: but this Act strikes not against such as have entertained the Thief any considerable time, after the committing of the Theft, and before Letters of Intercommuning were execute.

IV. The Receptor with us cannot be punished, or thole an Affize, till the principal Thief be first convict; for if he be assolizied, the Receptor cannot be punished, *Stat. David. 2. cap. 29.* but by the 83. *cap. quon. attach.* It was only declared, that the Receptor should not be punished till the Principal was either convict or attainted, *i. e.* accused with us. Now it is inviolably observed, that the principal Thief should be first discuss'd, as was found

and in *Anno 1663.* a Verdict against *George Grahame*, before the Justices, finding him guilty of fraudulent using of a Bond, was rescinded, because the principal Thief was not first discuss'd: the case was this, *Achmuty* granted a Bond to the Lady *Bairfoot*, for eight hundred Merks, she assigned it to *George*, but thereafter payed him another way, and retired the Assignment, and after this she put both Bond and Assignment in a Bonnet-case; and *George* having come by the Bond (as he pretended from *Mrs. Billing*, Daughter to the Lady, who alledged she had got it from her Mother for Debt) he sends it to *Ireland*, and recovers payment, whereupon he was pursued for fraudulent using, and Receipt, and his Discharge of the former Assignment was produced, and the Bond was proven to have been in the Ladies Custody. Whereupon he was convict by the Affize, but this Verdict was rescinded with the Justices Interloquitor, because the Libel was not relevant, till Master and Mistress *Billing* had been first discuss'd, and the Verdict was unjust, because it was not proved that they saw *George Grahame* deliver back the Bond, and the general Discharge might have been given, *spe numeranda pecunia*; and if such using as this might be termed Theft, all Actions of Exhibitions would be turned in Pursuits for Theft.

But it may be doubted, whether if the principal Thief dye, the receptor may be punished, seeing after death the Principal Theft cannot be enquired into, for though that privilege be granted, *quoad* the discussion, yet it infers no indemnity to the receptor; and we see, that where the benefit of discussion is granted to Heirs or Cautioners, he who hath the benefit may be pursued, if the party who would have been first discuss'd, be, *insolvendo*, and the reason of this maxim should hold, when the Principal Thief is a live, and not when he is dead, is, because it is presumeable that the pursuer is malicious against the receptor, for else he would doubtlesse pursue the Malefactor who did the most immediat wrong to him, which it is probable the receptor knew not. It may be also doubted, if the Thief dwell in *England*, or in *France*, whether the pursuer must first discuss him.

V. If the thing stolln by the Wife, be found with the Husband, he is not to be punished, except he expressly promise to defend his wife, or warrand her; but if the thing stolln by the Husband be found under the wifes keys, or under her care, she is punishable as a Thief, *Stat. Will. c. 19. & quon. attach. c. 12.* but these chapters are confus'd, and *de practica* both man and wife are lyable, if they were accessory to any other Thefts, but no otherwise.

Albeit the concealing of Theft be criminal in others, yet it is not so in a wife, *ibid.* And yet the husbands authority is said not to be sufficient, to defend her in atrocious crimes, though she be obliged, generally to obey him, *ibid.* From which it may be observed, first, That Theft is accompted an atrocious crime, for that Chapter treats of Theft, albeit this be much controverted

verted amongst the Doctors, who after a long debate, whether Statutes ordering the procedure in atrocious crimes, generally should be extended to Theft, which they refer to the arbitration of the Judge, who is to judge according to circumstances. And certainly, picking, or petty Theft, is not an atrocious crime, except where the Thief made a Trade of it: amongst other instances of this, I shall only cite *Robert Lander*, who was only banished for Theft and pickry, *anno* 1638. but Theft joyned with violence and rapin, stouth-reif is atrocious. 2. It is observable from that Text, that in crimes that are not atrocious, *per argumentum a contraria*, obedience to the husband, excuses the wife.

VI. It is statuted, v. 9. that servants are obliged to reveal their masters Theft, else they are guilty. From which it may be debated, that a servant who left his masters service immediatly, though he was in company with him at the committing of Theft, is not punishable for his being in company, since he might have been brought upon the place without knowing his Masters design, and being there, durst not have refused concourse upon such account. I saw some servants Absolved, by the Council from death, they having left their Masters service, as said is, though they revealed not the Theft, which they might have omitted, either through fear, or want of probation.

VII. Receipt then is punished as Theft, which must be meant only of immediat receipt, for the mediast sellers of goods belonging to Thieves or inobedient persons, who dare not come to mercat themselves, are only punishable by banishment, and Confiscation of their Moveables, the half whereof is to belong to the King, and the other half to the Suiter. And from this act may be raised these two doubts, 1. If this act should strike against the receivers of any other goods, than these of Highland Thieves, (eing the act speaks of Thieves who cannot come themselves to Lowland Mercats, whereby the acts made against Sorners of Clans, cannot be put to execution, yet surely this Act strikes against all sellers of goods belonging to any Thieves, seing the reason is the same, Theft being thereby promoted, and the statutory words run disjunctively against the Sellers of goods belonging to Thieves in general, & *inobedienti non distinguit nec nos*, or inobedient persons and Clanns. 2. It may be doubted, if this act should reach the sellers of goods belonging to any other Malefactors, seing the Rubrick speaks generally of sellers of goods belonging to Malefactors: And some think, that if any Malefactor be at the Horn, the sellers of his goods may be punished by this Act.



## TITLE XXI.

## Hame-sucken.

- 1 What privilege the Romans gave to a mans own house.
- 2 What is Hame-sucken, and the severall kinds thereof.
- 3 The punishment of this crime.
- 4 How Hame-sucken is punished, when it is only pursued by way of aggravation.

BY how much the person offended lives securely, by so much all invasions made upon that security are the more severely punishable; and therefore, seeing a man expects more security, and is least guarded against violence, whilst he lives peaceable at home, the Law punishes more severely injuries done him there than elsewhere; and it is very presumable, that no person would enter anothers house, with a design to offend him, or would offend him there upon any account, except he vvho had very much malice and prejudice against him: For by injuries committed against a person in his ovvn house, not only the publick peace, but even the Lavvs of hospitality are offended.

I. According to the Civil Lavv, no man could have been dravvn out of his ovvn house, nor could have been cited therein, *l. ff. 18. de in jus vocando* plerique putaverunt, nullum de domo sua in jus vocare licere, & quia domus tutissimum cuique refugium atque receptaculum est eumque qui inde in jus vocaret, vim inferre videri. But I believe the reason of this Law was, because *vocatio in jus* was at that time used, not by a simple citation, as now, but *oborto collo*, and by dragging the defender to the Court, For else it is not imaginable how the citing a person at his house could infer violence, or ryot against the citer: but though this Law is now so far antiquated by custom, that any person whatsoever, may be cited in his own house, & may be violently drawn forth thereof by Captions in Civil cases, and wartands in criminal: Yet so pungent is the reason insert in that Law, that *domus cuique tutissimum refugium atque receptaculum est*, which is likewise repeated, *l. i. C. de pretor & honor. pretor*: That it being joyned with the former reasons above expressed, hath introduced that by the statutes of the greatest part of the world, *gravior estimatur injuria alicui facta in domo sua quam alibi & ideo ut plurimum duplicatur pena maleficii commissi in domo offensi*. *Cabal. consil. criminal. casu. 13.* Which is likewise consonant to the Civil Law, whereby of old, the entering another mans house, *invito domino*, was punishable, as a Crime. *l. i. Corn. de injuriis*, and thereafter vvvas punishable, *actione injuriarum, l. 23. ff. de injur.*

II. The invading a person in his own house, with us is called Hame-sucken and is defined to be, when any person violently enters into a another mans house without licence, or contrary to the Kings peace, or seeks him, or assaults him there, and comes from a Dutch word *Hai*me, which signifies a a house and *sucken*, which signifies to seek or pursue: concerning which crime it is observable, That 1. It either may be pursued as a separat crime, or as the aggravation of another crime; when it is pursued as a formal crime, the pursuer must Libel that he was invaded violently, or sought after in his own house: for if the offender did come in upon invitation, or accidentally, and thereafter upon an emergent offended or invaded the Master of the house, this is not properly Hame-sucken, seeing the offender did not invade or seafe.

The

The wrong must be done to a person in his own house, that is to say, where the pursuer was staying, lying or rising night and day, *Reg. Maj. 4. cap. 9. v. 1.* Upon which place *Skeen* observes, *Et qui insultum fecit juxta domum hac lege puniatur. Bartol. in authentic. de appell. §. ad hoc.* And I find that *Clar. Quest. 82.* determines that a Statute which doubles the pain of invasion, when the invasion is made in the house of a Judge, or Magistrat, takes place not only against invasions made in the house it self, but likewise made in the confines thereof; And *Albericus de Statutis l. 2. quest. 35.* extends to crimes forbidden in places, to crimes committed within the confines thereof, which though it be contradicted by *Vincen. de fran. decisione, 402.* Because rigid and special Laws are strictly to be interpret; yet I think, that if the invasion was made in any place that properly belonged to the house, such as the Poreh, Court, Inner-Court, or Office-houses, that invasion should be punished as Hame-sucken, because a man is said to be at home there, and expects as much security there (which is the reason inductive of the Law) as any other else. And thus the ordinary form of Libels with us bears, that the pursuer was invaded within his dwelling house, or precinct thereof. *Thomas Crumbie*, was hanged, & his Movable escheat, for offering to strike my Lady Traquair with a drawn sword in her Garden, 23. Feb. 1638. but if the place wherein the invasion was made, was no inclosure, and so adjoynd to the house, I think that though it was at the very doore of the house, that *Bart.* his opinion of *juxta domum*, does not hold. And thus a Gentleman being pursued upon the 24. of July 1663. for hame-sucken, in so far as he came to *Alexander Provosts* dwelling house, and there called him out; and forced him to yoke his Carts and scourged him; The Justices would not sustain the Libel as Hame-sucken, because it was not committed in the pursuers house, though it was done at the house door, but sustained it as oppression: And yet I think that if it had been alledged in this case, that this invasion was Hame-sucken, because the person injured was called out of his own house by the offender, and so *quoad him* must be repute as if he had been in it; The Justices would have sustained this to have been Hame-sucken, if it could have been proved that the wrong was done immediately without any preveening provocation; for the Law would have presumed that the person was called out of design to evite the quality of that crime, *nec debet fraus sua quemlibet adjuvare.*

It is doubted if a mans Shop is to be accounted his house, to infer this crime, and though it may be alledged, that the security is to be expected, as well in the one, as in the other; And that it is as much the publicks interest that Shops be not entered, and persons disturbed therein, as houses, for thereby publick commerce is lesed, as well as privat safety; yet upon the other hand it may be alledged, that by the foresaid *c. 19. v. 1.* That is only called a mans house, where he uses to rise and lye: And amongst the different opinion of Lawyers, I find this reconciling distinction used, that if the Shop be adjoynd to the house, and be not repute a different house, that *in casu*, invasions in the Shop infer Hame-sucken, otherways not, *Cabal. ibid.* where he likewise cites *Salicet, Albericus*, and others, determining that if a man have two houses, in one whereof he dwells not with his family, that his being invaded in that house makes it not Hame-sucken, which is most consonant to our own Law above cited, which requires lying and rising. And thus I remember that in June 1669. *Thomas Sydserf*, having pursued *Mungo Murray*, &c. for invading him in his Play house, that invasion was not punished as Hame-sucken, but with imprisonment. *Nota*, the former Law against Hame-sucken takes place as well when the invasion is committed in a mans hyred house, as his own, if he and his Family live there, *Skeen ibid. Et Bartol. l. e. ad legem jul. de adulteriis.*

It may be likeways doubted, whether the beating a man in his own Ship, can be punished as Hame-sucken, since a man has not his Family there, and so it cannot be called properly his *hame*. But yet, I believe it should be punished as such, since it is the ordinary place of a Sea-mans residence: And thus it hath been found vvith us that a Skipper may prove an injury done to him in his own Ship, by his own Servants; though Servants cannot prove *regulariter* for their Master, except in the case of Hame-sucken.

It hath been likeways doubted, whether an Injury done to an Inn-keeper, can be punished as Hame-sucken, when done to him by such as lodged in his own Inn? And though it was alledged, that this was a greater Crime, than if it had been done by a person who lodged not there, because that was a Hame-sucken against Hospitality: Yet because an Inn is a publick House, and belongs as well to the Lodgers as to the Master. The Justices did only sustain this as a great Ryot, but not as Hame-sucken, in the case of *Mure of Penniglen*, anno 1675.

III. The punishment of this Crime is the same with the Ravishing of Women, *R. M. L. 4. cap. 9. and 10.* And therefore the Laws made against ravishing of Women, are ordinarily lybelled upon, there being no special punishment exprest in the Laws against Hame-sucken, should be pursued within a night after it is committed, which time is allowed for getting the Advice of Friends, *ibid.* And yet in the former case of the Lady *Traquairs*, it was sustained after two Months time, and doubtless that short Prescripion is now obsolet, and the reason of it has been, because it being punishable as ravishing of Women, it hath borrowed from that Crime, the necessity of being recently pursued. And I think, that though the foresaid short Prescripion be not allowed by present Custom, yet the Judge should consider whether any considerable time hath interveened, for else, *per intervallum temporis videtur dissimulari sicut injuria dissimulatur*. Nor is it probable that the person offended would have sitten long with such a wrong, and since that Crime which was not Capital of its own Nature, does become such by the Circumstance of the Place, it is reasonable that the person accused should not ly long under the hazard, & *gravatus in uno levandus in alio*: This Crime hath likewise this priviledge, that it may be proved by the Pursuers own Servants, Friends, or other Witnesses, who are otherwise lyable to Exception, which is introduced not only upon the accompt of necessity, but likewise *in odium* of the Offender: Nor were it possible to prove Crimes of that Nature by others than are in the Family.

IV. When Hame-sucken is pursued only as an Aggravation, it is libelled that such a thing was done by way of Hame-sucken, and the punishment thereof is arbitrary, *eo casu*, and this is soold an Aggravation of a Crime, that *David, 2 Sam. chap. 4. vers. 11.* aggravats the death of *Ishboseth*, because they had slain him in his own House, and upon his own Bed. The Libel in Hame-sucken runs thus, that albeit by the Municipal Law of this Kingdom, the Committers, of the crime of Hame-sucken, that is to say, who ever invades any of our peaceable Subjects and Lieges vjolently with weapons, within their own dwelling houses, or precinct thereof, contrair to our peace, shall incur and underly the pain and punishment of death, as our saids Laws and Acts of Parliament in themselves proports; Notwithstanding whereof, it is of verity, that upon last by past, the forenamed persons above-complain-ed upon, being boden in fear of war, with Sword, and other weapons invasive, came under silence and cloud of night, about ten hours at even, to the said *A. B.* his dwelling house, where he was quiet and in a sober manner for the time, &c.

TITLE



## TITLE XXII.

### Breaking of Prison.

- 1 The punishment of breaking of Prison by the Civil Law, and ours.
- 2 How the going out of Prison, when broke by another, is punishable.
- 3 Whether he is punishable, if he return.
- 4 How an endeavour to break Prison is punishable.
- 5 How the Master of the Prison is punished, if the Prisoner escape.

**P**RISONS are ordained to keep Prisoners till they be tryed, and therefore he who breaks them, does more than tacitely acknowledge the guilt, since it is to be presumed that if he were innocent, he would think himself obliged in Honour, as well as Interest, to wait till he were absolved judicially: and since Prisons are the greatest Securities of the publick Peace, therefore to break them is a kind of Sacrilege: And as the Walls of our Cities are sacred, because they defend us against our Enemies, so should Prisons, because they defend us against our wicked Countrey-men, who are the greatest Enemies of the Common-wealth. His Majesties Advocat did also in the case of *Hiloun*, well call breaking of Prison a publick Hame-sucken.

I. The breaker of Prison (whom the Civil Law, calls *effractor carceris*) was punished *pæna capitali*, l. 1. ff. de *effractor*: But by that punishment was meant not death, for that were too severe, but *capitis diminutio est mors civilis*; and in effect he was arbitrarily punishable, except he were a Souldier, for Souldiers breaking Prison were punished by death, l. 13. ff. de *re militi*. Because Souldiers having ordinarily more Courage, require that they should be over-awed by greater punishments. And yet I know, the learned *Matheus* thinks, that *quilibet effractor carceris*, is punishable by death: But I think not his Arguments concluding, for though *Ulp.* l. 1. ff. de *effractor* says, that *supplicium est sumendum*, yet it follows not, that by *supplicium* is meant death, since all the Glossators make *supplicium* a genus; and when Lawyers mean death by it, they say, *ultimum supplicium*. And though *Cicero* says, that *exilium non est supplicium sed perfugium & portus supplicii*, he speaks there as an Orator; and indeed as to these who deserv'd to die, Banishment is a Harbour and Happiness. Nor does his other Argument brought from the above-written Law, concerning Souldiers, conclude, for Souldiers, as I observed, are more severely punishable than others, because of the hazard of the Event, and strictness of Discipline, and because, as I observed, they fear less, and so ought to be more threatned than others; but what need was there to have made a special Law for Souldiers, if all Breakers of Prison were punishable by death? And it is against the nature of Arbitrary Crimes (such as this is confessed to be) to be punishable by death: And the Word *capite punire*, should always be interpret in the meekest Sense it can bear: Nor see I why the Law would have spoke so generally, if it had designed that severity. By our Law, Breakers of Prison are punished by banishment, or fynyng, according to the nature of the Offence, but there is no expresse Statute determining the punishment.

II. He who fled out of Prison, when it was broken by another, should, in the judgement of *Julius Clarus*, be punished in the same way as if he had

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been found guilty of the Crime it self, because he confesses the Crime, and flight is a presum'd acknowledgment, *Far. quest. 21. num. 25.* but this seems to me too severe, for flight is a presumption; and it is unjust to condemn upon presumptions, and were it not absurd to condemn a man to die for a Crime of which he is found by the tryal of others to be innocent: And men may flee out of Prison, rather because of the inconveniencies of restraint, than out, from the conscience of guilt, *vid. Pegner. quest. 1. crim.* But if there had been no violence used, a person imprisoned for a Criminal Cause, may escape lawfully, *Perez. ad tit. C. de custod. reor* because he may redeem lawfully his own blood from hazard. If the person incarcerated was incarcerated only for a civil Debt, he going out of Prison, was even in that case found punishable only by an arbitrary punishment, *July 3. 1673.* In the case of *Francis Irving of Hiltonn*, who was pursued for breaking the Prison of *Aberdeen*, where the Libel was founded upon the common Law, and the Laws of Nations, and upon our Municipal Law and Custome, without citing any particular Law: And subsuming that he being incarcerated for a civil Debt, he and others brake the Prison, at least escaped, the Prison being broken, and therefore concluded an arbitrary punishment, and payment of the damage done to the Tolbooth. Against which Libel it was alledged, 1. That it was not relevant, since it condescended upon no statute; nor had we any Statute or Practick making the going out of Prison, when it was broke by another punishable, and when the imprisonment was only for a civil debt: Nor was this a Crime by the Civil Law, which punisht only *effractores carcerum*, but not *eos qui evaserunt*: For *nigrum nunquam excedere debet rubram*, that is to say, nothing in the Title should exceed the Rubrick and therefore the inscription or Rubrick being *de effectoribus*, only such were criminal by that Title, as were *effractores*. And as *Perez.* observes, *num. 16.* *Si absit violentia potest reus aufugere à carcere quem apertum vidit*: And the reason of punishing *effractores carcerum* does not militat here, since there is no prejudice done to the Prison, nor violence committed against Authority. And it is lawful, because natural to every man to recover his natural liberty; nor was it ever heard that a man running away from a Messenger, was punished as *effractor carceris*, and yet that is the same guilt with what is here pursued. 2. The Libel concluding art and part of the breaking of Prison, because he escaped out of Prison when broken, is most irrelevant, since the one may exist without the other; for one may escape and not break, and therefore the one cannot be necessary illative of the other. 3. The paying damage cannot be concluded against one who only went out, since he who goes only out of Prison occasions no damage, and consequently ought to pay none. To which it was replied, that as to the first, it hath been the constant opinion of Lawyers, that going out of Prison that is broken is a crime, since the Prisoner ought to have taken no advantage of another mans crime, but ought rather to have hindered the breaking of the Prison, and to have cryed and advertised the keeper, whereas here the Prison was broke by a long and daily work, and yet no notice wes given; likeas, *Skeen* in his Annotations upon the 1. *Chap. Stat. David* 2. observes, that *qui effracto carcere aufugerit capite punitur*, which is consonant to 13. *ff. de re milit. §. l. 36. ff. de pan.* To the 2. it was replied, that the Prison being broke in the night time, the Pursuer could not distinguish who broke it: And if it were necessary to prove breaking it should be imposible to prove the crime; and since the Pannel might have stayed and have cleared his own innocence, it was just that the Law should conclude him guilty; and except the Pannel could by way of exculpation alledge that it was broke by another, and offer to prove by whom it was broke, he who goes out should be concluded to be art and part. Upon which debate the Justices sustained the Libel to infer an arbitrary punishment

ment : But yet the Assize assoilized the Pannel, though it was proved that he was in Prison, and that the Prison was broke, and that he came down upon a Rope, for they thought that since his breaking of Prison was not proved, he ought not to be concluded guilty, but here the verdict was contrair to the Interloquitor.

If the Prisoner was unjustly detained in Prison, *Clarus* thinks that he is not to be punished, though he brake Prison, *quest. 21. num. 26.* But this opinion is most absurd, for he ought not to be Judge to the lawfulness of his own imprisonment, but ought to apply to the lawful Authority for redress. And *l. 13. ff. de custod. reor.* doth expressly determine, *eos puniendos esse quamvis innocentes inveniantur ex eo crimine propter quod in carcerem impacti sunt.* As also, it is very clear, that *l. nihil interest. C. de captivi.* Upon which the Doctors found their opinion, is only to be understood of such as broke the enemies Prison.

III. He who fled, having broke Prison, is not thought punishable as a breaker of Prison, if he return, *Boer. decis. 215. Clar. num. 28.* But this also seems debateable, since no man can give himself a remission: And there being *justitiam fisco*, by the guilt once committed, it cannot be taken off without some deed of the power offended; and we see that murderers and others are punishable by death, though they put themselves in Prison, *diminuit non tollit crimen.*

IV. These who broke not Prison, but essayed to break, are to be more meekly punished, than those who broke prison, *Clar. num. 27.* which is also observed in *Scotland.* Not only these who broke prison, but these who assisted them, and the Keepers, by whose contrivance or negligence they escaped, are punishable, *l. 8. 10. & 12. ff. de cust. reor.*

V. If a Prisoner escape, the Master of the Prison is obliged to purge himself by Oath, that he escaped without his will or consent, *Stat. David. 2. cap. 1. num. 6.* And by the *19. chap. num. 2. Stat. Rob. 1.* the Keeper of the Prison is to answer for the Malefactor, either in body or goods; which takes only place where the keeper was negligent in his duty, for else he is not lyable, as was found the 23. of *November 1675.* in the case of Captain *Martine*, who being imprisoned by the Lords of Session, for not finding Caution in a pursuit before the Admiral against him, for taking free ships, he escaped in Womens Cloathes; and the Keepers being pursued, it was alledged for him, that Keepers were only *depositarii*, Prisoners being depositat in their hands, that they might thereby be reserved to a publick tryal, & *depositarii tenentur tantum, de dolo, & lata culpa.* And *Farinacius* tells us, that it was so decided at *Rome*, where a person escaped thus in Womens Cloathes. To which, though it was answered, that Servants, getting a Fee, are lyable, *ad exactissimam diligentiam*, without which, privat diligence, and publick revenge, might easily be disappointed: Yet the Lords, upon tryal of the Keepers innocence and diligence did assoilzie him. But I have seen that sisters have assisted their Brothers, and Wives their Husbands, to escape, even for Crimes, without being punished; and *per l. 2. ff. de recept.* the receptors of such near relations are conniv'd, at so gentle is the Law, and so much it both follows and pardons nature Breaking Prison in the night, is a great aggravation of this Crime, *οι φυλακισται τοιχωρυχοι καταλεζομενοι μεταλλιζονται οι δε ημετεροι, διηνεκως η προσκαιρος εις εργον εμβαλλονται*  
*l. ult. Basil. h. t.*



# TITLE XXIII.

## *De Dardanariis,*

O R,

## Fore-stallers.

- 1 *What Fore-stallers are, and the severall species of this Crime by the Civil Law.*
- 2 *The difference betwixt Fore-stallers and Regraters.*
- 3 *The first Branch of this Crime, by our Law, is the buying up Corns to a Dearth.*
- 4 *The second is, the buying Corns coming to a Mercat.*
- 5 *The third is, the advising others to commit these Crimes.*
- 6 *The fourth is, the buying Commodities in a Mercat, upon design to sell the same again at any other Mercat within four Miles.*
- 7 *The punishment of this Crime.*

**M**EN haveing gathered themselves into Societies, they did for their own Conveniency & Provision, grant many Priviledges to Mercats, & such as frequented them, & that all persons might be the more equally provided, they did lay such Restrictions both upon Buyers & Sellers, as they thought fit for that Design. For albeit it be lawful for every man to use his own as he thinks fit, and to sell his Commodities where and to whom he pleases, yet seeing common Justice is to be preferred to privat Advantage, it was the interest of the Common-wealth, as upon that account, they will not suffer any man to abuse his own, to the detriment of the Common-wealth, (as it is to be seen in these Laws which concerns Interdictions) so much less will they allow men to wrong the Common-wealth for their own privat gain. The great instance whereof is seen in this Crime of Fore-stalling, or regrateing.

I. Fore-stallers were by the *Romans* called *Dardanarii* à *Dardano*, (a Merchant who was famous for that Crime) And by the Civil Law these were accompted *dardanarii* properly, who hurried up their own Corns, or bought up the Corns of others, of design to keep them to a dearth, but improperly these were likewise called *Dardanarii*, who did buy up any other Commodity unlawfully upon that design, vvhich kind of Merchants were more properly called *parapoli*, by Novel of *Valentinian*, which Crime as it was punished *per legem juliam de annona*, so the punishment of it *per l. sextam, ff. de extra. crim. est 20. aurei & puniri extra ordinem.*

A third sort of *Dardanarii*, numbred amongst the Doctors, are these who properly are called *revenditores* & *qui emunt ut carius vendant ex raritate raritatis raritatem affectantis Tholosanus. cap. 135. num. 10.* Mathew also makes Monopolist a fourth Branch of these, and surely they are equally guilty of prejudging the Common-wealth with these above related.

II. Though Fore-stallers and Regraters be ordinarily taken for one and the same, yet there is this difference betwixt them, that Regraters are only those vvho buy Goods, that they may sell them again at a dearer Rate: But Fore-stallers are such as buy Goods before they come to an open Mercat; but seeing Custom uses these Words promiscuously, vve shall divide Fore-stallers or Regraters into these severall Species and Branches.

III.

III. The first Species or Kind of Fore-stallers, is of such, who either privately, or by entering into Societies, buy up all Goods upon design, that by making themselves Master of the Commodity, they may exact such Rates for them as they think fit. And this is very fitly made a Crime, because it is absolutely destructive to the Conveniency of the People. But because this is (as all designs are) a latent act of the mind, and so is hard to be proved, where the Fore-stallers have not entered into a Society, therefore this guilt is *quoad* this qualification and design inferred from Presumptions, as if a person should offer to buy all the Salmon in *Scotland*, and deal with all persons who have any to sell, that they should not sell to any other. 2. If any of these universal Buyers should give extraordinary prices, which is presumed he would not do but upon some design. 3. If he should boast that none else had that Commodity to sell, or such other words as might be ground for a Judge to infer the Design; yet it may be doubted here, if the universal buying of any of these Commodities, in order to a foreign Transportation, and where none of them are vended at home within the Countrey, can infer the Crime of Fore-stalling, seeing Strangers are only prejudged by heightening the prices in that case: But seeing the Countrey would be likewise thereby prejudged by being absolutely deprived of that Commodity, certainly the guilt will be extended even in that case, which will hold likewise in Strangers, who buy up the Commodities of the Countrey upon that design, who may be likewise therefore punished within the Countrey where they commit the guilt, being lyable to that Jurisdiction, *ratione loci delicti*.

IV. The second kind of Fore-stallers is of these who buy any Goods coming to Mercats, before they come to the publick stall or place where they should be vended, and this is the reason of the denomination: And the reason why this is made a Crime, is, because Mercats being institute for the good of the Common-wealth, every thing by consequence behoved to be discharged, which is absolutely destructive to it; and the buying any thing before it come to the Mercat, is such. But it may be doubted here, whether Commodities may not be bought by Merchants in a publick Burgh, though they be going to the Mercat of another publick Burgh? As for instance, if a Merchant in *Burntisland* may not buy Skins there from one who says he is carrying them to the Mercat of *Kinghorn*: And if this were not allowed, it would occasion much trouble both to sellers and buyers. 2. It may be upon the same ground doubted, if one may sell, finding that he is not able to stay to a Mercat day, which it may be, will be but once in a week in some places. As to which difficulty, my opinion is, that these can only be accounted Fore-stallers, against whom something of design against the common good can be proved: As if the Burghesses of one Town should be proved to have entered into a Contract to buy up the Commodities which were going to another adjacent Town, or should stand in the way every Mercat day upon design to buy up the Commodities that were going to the next adjacent Town. And I know this to have been the opinion of some learned Lawyers, in a case betwixt the New and Old Towns of *Aberdeen*; but to make, that the buying of things generally before they come to a Mercat, should infer a Crime, were most hard and inconvenient. And because the design is the great thing to be looked to, *non effectus sed affectus*, therefore both the Act of Parliament and Criminal dittay in this case, speak only of Fore-stalling and Regrating; for by the doing any thing of this nature commonly and frequently, *animus delinquendi*, is most probably inferred. And by the same reason, I conclude it probable alwayes for the defenders in this case to alledge by way of exculpation, that what they did, was done either ignorantly, or necessarily, or generally, *alio animo quam delinquendi*, v.g. If one in *Bruntisland* were pan-

nel'd for buying Skins that were coming to the Mercat of *Edinburgh*, he might alledge, that being obliged under a failzie to deliver such a number of Skins betwixt and such a day, that therefore he was necessitat to buy these: Or it any were alledged to have bought Stockings that were coming from a Mercat, he might alledge that he bought them for his own use, or that he knew not there was a Mercat upon the place. And I conclude generally, that the buying any thing for our own privat use, makes not the buyer in any case culpable of this Crime, since he does that *tanquam quilibet & non tanquam Mercator*, and Fore-stalling is a Crime in Merchandizing.

V. The third degree of it is, the advising these who are to sell, to hight the price, or the disswading the sellers to come to any particular Mercat.

VI. The fourth is, the buying Commodities in a Mercat, of design to sell the same again in the same Mercat, or in any other Mercat within four Miles thereof.

VII. All which species are expressly enumerat. *Cap. 20. Pa. 4. K. Ja. 5.* By which the punishment is appointed to be imprisoning of their persons and the Echeating of their goods bought and sold, the two part thereof belongs to the King, and the third to the Sheriffs, or other Judge by whom they are condemned. From which Act it may be concluded, that any Judges are competent to punish Fore-stalling: albeit of old, the Chamberlain was, in his chamberlain air, the proper Judge of Fore-stallers, as is clear by the Chap. 35. *ft. K. Wil. vid. & cap. 78. leg. burg.* And in the 143. *Act. Pa. 12. K. J. 6.* where the punishment is ordain'd to be 40. Pound for the first fault; 100. Pound for the second; And Escheat of all his Moveables for the third.

I find several persons convict of this crime, as *Cairncrosse* and others, 9. *June 1599. Anderson 12. June. Young* and others 11. of *June* that Year; And *Halyday 6. August 1596.* But I find no punishment to have followed in this, or any other case: Though this crime cannot be said to be in desuetude seing there are some instances of it; Yet *mitius puniri debent*, Because these cases are so few, and no punishment hath followed upon them.

I find it was alledged for *Young, 11 June, And Halyday, 11 August*, foresaid, that the Libel was not relevant, not condescending upon the persons to whom the Goods Fore-stalled were Sold, nor the place, nor time, which was repelled, because For-stalling was unlawful in all places, and at all times, But certainly this reply was not relevant, for else neither time, place, nor person needed be condescended on, seing these are still unlawful at all times. But I think the true reason why it should have been repelled, was, seing common Fore-stalling and Regrating was libelled, which is *nomen habitus*, and not founded upon any particular Act, and therefore the particular Acts needed not be libelled, though even in this case they must be expressly proved. But certainly, sometimes the time, and place is necessary, as where it is libelled, that Goods were bought and presently sold, or within four Miles of the place where they were bought: for the Crime in this case is inferred from the speciality of time and place.

It was alledged, that Confiscation of Moveables could not be inferred, though for the third or fourth Fault, except the Pannel had been convict for the first two: Which was repelled likewise, Because the King could not be prejudged in his Interest, *quoad*, the Confiscation by the negligence of his Advocat, or any privat Informer, by not pursuing: Nor could that Negligence purge their guilt, or procure them an Impunity. And it were absurd, (seing Crimes and punishments are to be commensurat) that these who had continued in that guilt for many years, should be no more punished, than these who had but once incurred the same.

TITLE



## TITLE XXIV.

## Usury.

1. In what Contracts Usury may be committed.
- 2 The taking of more Annualrent than the Quota stated by Law, is the first Branch of Usury.
- 3 The second is, to take Annualrents before the Term of payment.
- 4 The third is, to take Wadsets in defraud of the Law.
- 5 Whether a Clause not to redeem for a long time, be Usury.
- 6 The probation of this Crime.
- 7 The punishment of it.

Usury is that Crime, which is committed by taking more Annualrent for any Sum lent, than what is allowed by the Law of the Kingdom.

I. This Crime is committed properly in Money, & *in mutuo*; but yet it is both by our Law, and the Civil, and Canon Laws, extended to other Contracts: for with us, it is committed in Bargains of Victual, or Tacks, as shall be cleared by the subsequent Acts; and therefore Lawyers divide Usury, into that which they call *direct Usury*, *quæ obtinet tantum in mutuo*; and *indirect Usury*, which takes place in other Contracts.

Usury is also divided, *in usuram manifestam & velatam*; which co-incides almost with the former distinction.

By our old Law, Usury could not have been pursued in the Usurers own life. but he might have repented him of it, at any time before his death; so that it was not the Commission of the Crime, but the continuance in it, which was punishable: But if he repented not, his Heirs might be forefaulted, *l. 2. Reg. Maj. cap. 24.* And this, *Skeen* observes, to be consonant to the Law of England, whereby the Penalty of a living Usurer, belongs to the King, but of a dead Usurer, to the Church.

II. The true Method in this Title, is, to clear the several kinds of Usury, determined by our Statutes. The first Species thereof is,

Whoever receives more Annualrent, than Ten for each Hundred, shall be punished as Ockerers, or Usurers, conform to the Laws of the Realm, already made, *Parl. 11. K. Ja. 6. cap. 52.* And yet I find no prior Law to this, expressing the punishment of Usury; only it is said, *Par. 6. Ja. 2. Act. 23.* that Keepers of Victual to a Dearth, shall be punished as Ockerers, and this is properly Usury.

By Act of Parliament, 1649. it is appointed, that the Annualrent of Money, should be at six *per cent.* conform to which Act, all Annualrents were payed in Scotland, till 1661. At which time the Parliament, 1649. was rescinded; whereupon it was debated, in *Hugh Roxburghs* case, *March 23. 1668.* whether the taking of more Annualrent, than six *per cent.* after the year 1649. could infer Usury; and that it could not, was urged from these reasons. 1. That where there was no Law, there could be no contempt: but so it was, that the Acts of Parliament 1649. were no Laws, that Parliament being rescinded, *ob defectum authoritatis*, and without any *salvo*, as to what was past. 2. The Liedges might as well be punisht now for transgressing

the penal Statutes, made by the usurpers, seing these were binding, the time of the transgression, and both want authority equally. 3. By the Act betwixt Debitor and Creditor, 1. Session 1, Pa. K. Ch. 2. Such pactions are only declared usurious, *quoad futura & inclusio unius est exclusio alterius*. To this it was answered, that the Parliament 1649. was in vigor till the year 1661. Ergo. before that time it was Usury, to take more than the Annualrent therein prohibited; and albeit the defect of Authority might be pleaded, where the Crime committed, depended merely upon the Authority contraverted. Yet in this case it could not; seing Usury was a crime, which was prohibited by all Laws. And as to the *quota*, which was all that was determined by the Parliament, 1649. It was no such thing as concerned the Rebellion, for which that Parliament was rescinded; but was a reasonable, and universal good for the Kingdom, and approved by the present Parliament. And those who took annualrent during that time, at more than six *per cent.* did in so far oppress their Debtors beyond others, and so should be punished. 2. By the Act a-nent penal Statutes, 1661, Usury is excepted from the penal Statutes therein abridged, which needed not, if the taking more than six *per cent.* for the years immediatly preceeding, had not been Usury. 3. The Lords of Session did still restrict the Annualrents, even during these years, to six *per cent.* which they could not have done, if that Law had not warranted them; as in the case betwixt *Wanchop and Lawder.* 1665. for if that Act was in force then, it was a Crime to take more than was therein commanded, if it was not abrogated; then the former Act, 1649. appointing eight *per cent.* was in vigour, and so the Lords could not restrict the annualrents to six, against an expresse Law. This case was not decided, but the Justices inclined to think, that though the Act 1649. was abrogated; yet it was a sufficient warrand, to regular the Decision of civil cases, because all bargains were then made, with respect to the *quota*, thereby determined, & *erat lex habita & reputata*: but that being abrogated, it could not found sufficiently a criminal Action, to infer so severe a punishment, as that of Usury; for a Crime is mainly such, because Authority is contemned, and contempt is the essence of a Crime; but so it is there could be no contempt where there was no Authority. But it may be doubted, if a Merchant who was to imploy his stock upon Merchandize, whereby he might have got far more than the annualrent of his stock, should at the desire of his friend, then in great straits, lend him his Money, for more than the ordinary profit; if in that case he could be punishable as an Usurer? And albeit our Law be general, yet here *absit animus fœnerandi*: and there was no advantage taken of the Debtors necessity; for which, Usury is mainly punishable. And I find, that *Abbas c. Naviganti de usur. num. 13. & Socin. tract. de usur. num. 75.* do conclude this to be no Usury. Yet I know, that some judicious Lawyers with us, did at a consultation upon this same case, conclude that the Justices could not receive this exception seing they were tyed to strict Law; but they thought that the Council might allow some mitigation.

III. Another *Species* of Usury by our Law, is, to take Annualrent before hand that is to say, before the term of payment, which was ordinarily done, by retaining a years Annualrent, when the Mony was first lent, and this is determined to be Usury, by the 222. *Act Pa. 14. K. Ja. 6.* and thereafter by the 28. *Act Parl. 23. K. Ja. 6.* by which last, it was likewise Statute, that whosoever shall detain the time of the lending, or shall exact, crave, or receive from the Debtors, Annualrent at the time of the lending, or add the same to their principal summs, or vvhosoever shall exact, or crave Annualrent, shall commit Usury. And this seems to be founded upon that principle of the Civil Law vvhereby *puniebantur qui plus petebant, & plus tempore petere dicebantur qui petebant ante tempus debito constitutum.* Upon

Upon these last words of the Act of Parliament, forbidding the exacting, or craving Annualrents before the Term of payment, there was a dittay founded against *Purdie*, in the year 1666, for taking ten pound Scots, as the Annualrents of fifty Merks, upon the 18. of July, whereas no Annualrents was due, till *Martinsmas* that year. Against which dittay, it was alledged, 1. That this Species of the dittay was merely Statutory, and so was not to be extended, either beyond the interest of the Leidges, to save which it was inferred, or beyond the express words of the Act; but so it is, that it was only the interest of the Leidges, that they should not be forced to pay interest before hand, but that they might voluntarily pay their Annualrents, without any danger to the receiver, which may sometimes be for the advantage of the payer, as for instance, if a person who were liable for Annualrents at *Martinsmas*, might be for his own advantage desirous that his Creditor might receive his Annualrents in *September*, because he would not have the conveniency of paying them at *Martinsmas*, and might be either at expences, or in hazard to send them. And therefore, seeing the receiver here had raised no charge of Horning, nor used no other diligence for compelling the Debtors to pay the Annualrents, his voluntary offer of them should not prejudice the receiver, especially seeing by the narrative of the Act, it will appear that the eviting of oppression, in exacting Money before the Term, was that against which the Act of Parliament intended only to guard. 2. Though by the first part of the Act, exacting, craving, or receiving Annualrents at the time of the lending, be expressly forbidden: Yet when the craving Annualrents before the Term of payment (which is the clause founded upon, in this dittay) the Act speaks only thereof, craving, or exacting; but doth not forbid simply receiving. 3. *Consuetudo etiam mala & injusta excusat usurarium a pena.* Bart. in lege sequis fugitivis, ff. de lit. edit. 80. cum consilio 170. And it was very notour, that in this case there was nothing more ordinar, than for honest and just men in Scotland, to take Annualrent before the Term, from willing Debtors, either to supply their own necessity, or to gratifie their Debitor upon occasions. And it were very unjust, that the Pannel who was a poor Merchant should insulare himself, in *apertur juris*, thinking himself vvdrainted in what he did, by the practice of the Countrey, and of the most intelligent persons therein. 4. *De minimis non curat lex*, not should severe and statutory punishment be inflicted for errors where no person is any way considerably prejudged. And in which, it cannot be presumed there was any guilt, seeing the advantage was so small; for the only share the Pannel reapt of this, was the Annualrent of ten pound, from July to *Martinsmas*, which could not exceed three shilling Scots; so that to conclude, an honest sincere Merchant, who was otherwise *integerrima fama*, guilty of Usury; and to infer confiscation of all his moveables, and infamy, which is the punishment of Usury, is against all sense and reason, who are not (as the Justices) tied to strict Law.

Notwithstanding of all which, the Justices did find the dittay relevant as founded upon the above-written clause of the forsaide Act; but the grounds above related, being represented to the Council, they rescinded the Justices Interloquitor; and yet the Justice did again condemn *Hugh Roxburgh*, 28. of November, 1668, upon the same Act, and like dittay; but that Interloquitor was likewise stoppt by the Council.

IV. The third Species of Statutory Usury with us, is committed by these, who to cheat the Law, colour their Fraud by taking, not more Annualrent directly, than that is prescribed by the Law, but taking Wadsets of Land from the Borrower, for more than their Annualrent can extend to, and set Back-racks to them for payment of what is agreed upon. To prevent which, and all such Usury (which is called by the Law, *usura velata*) it is statute



by the 247. *Act Parl.* 15. K. Ja. 6. that whosoever receives such wadsets, or enters into any such bargains, for which more is taken, either in Money, or by any other Transactions, whereby any thing that is taken, may be reduced in Money, to more than the ordinar Annualrent, upon whatsoever colour or pretext, shall be guilty of Usury. And by the 62. *Act. Par.* 1. K. Ch. 2. It is declared, that for the future, it shall be Usury to receive proper Wadsets of Lands, and others, exceeding the Annualrents of the Sums, and bearing by expresse Provision, that the Lender shall not be lyable to any hazards of the Fruits, Tennents, War, or Trouble; for clearing of which Act, it is necessary to know, that Wadsets with us, are either proper, or improper; proper are these, wherein the Wadsetter runs all hazard of the Lands Wadset to him, and is to expect no more Annualrent for his Money, than what Fruits of the Lands remain after all hazards. Improper Wadsets are these, wherein the Wadsetter is only comptable for what Rent he receives from the Lender; nor is he lyable to the hazard of Bankrupt-Tennents, War and Pestilence, with distinction, founded upon these hazards, is very agreeable to reason, and the common Law; for Usury being a certain gain, he who gets for his Money but a hazard of gain, commits not Usury, for that is *emptio iactatus retis*, as if I should lend Money, and get for my security the hazard of what Rent could be collected from a loading of Timber coming from Norway &c. And upon this ground, the Law allowed *seignus nauticum* to be much greater than all others, seeing the lender run the risk therein of all Sea hazards. But if the hazard be not so great as may compensate the excess of the Annualrent taken beyond what the Law allows, *eo casu*, it excuses not from Usury, as if a wadset be granted of a Miln, or Salmond fishing, if the said Rents do ordinarily exceed the Annualrents, by any considerable excess, then the receivers of the wadset commit Usury, notwithstanding of the hazard. And this brings to my memory, a case debated upon the 22. of January, 1672. wherein a Gentleman being pursued as an Usurer, in so far as he had taken his Debitor obliged to pay him a Boll, for the Annualrent of every hundred Merk, which according to the feir of the year did, for the two years of his wadset, extend to five pound the Boll, and so exceeded the Annualrent, by twenty shilling every Boll; yet this was found no Usury, because he in that case, took his hazard of the feir of the year, which might have been much lower: and because that the price of Victual varies much, according to the several Shires, and Years: And lest the People should be at an uncertainty in Criminal Cases, which were dangerous; therefore by the 122. *Act. Ja.* 6. Par. 14. it is appointed, that no man shall take more profite, than according to ten Pound, for the hundred Pound, or five Bolls of Victual, which the Annualrent being then, at ten of the hundred, and now at six, doth allow according to that probation, two Bolls for the hundred Merks, whereas there was but only one Boll taken here, for the Annualrent for the hundred Merk; nor was this Act abrogat by the *Act.* 247. Par. 15. because, though that be posterior, yet it doth not expressly abrogat this Act, nor ought it to have been abrogat for avoiding of uncertainty, as said is. And for the same reason, the undertaking of hazard hinders the taking of advantageous Tacks, to infer Usury, as was decided September 1668. wherein Robert Lawder was pursued as an Usurer, because he had taken a tack of two Buts of Land, and a Dovecoat for four years, which payed fifty Merks yearly, *communibus annis*, and that for satisfaction of the Annualrents of an hundred Merks, which Tack did bear this clause, that if the first year, Robert were payed, he should defalk so much of the Annualrent proportionally; notwithstanding of which clause, he refused to compt: It was alledged for the Defender, that the Tackman had run a hazard, because he might have been disappointed of all duty, *quo casu*, he would have got no releif. To which it was duplyed, that the same hazard

zard was in wadsets; and yet the taking a Wadset for more than the ordinary Annualrent, made the Wadsetter incur the Crime of Usury. Nor could this hazard defend, because it was not great, and there was scarce any hazard in it; nor could the danger be here objected, seeing after expiring of the years the receiver offered to compt with the lender, and to allow him both principal sum, and Annualrents; to which it was triplyed, that the Act of Parliament, discharging Usurary Wadsets doth not discharge Tacks; and there is a great difference, as to Usury betwixt Tacks and Wadsets; for Wadsetters have the liberty to require their Money from the Debitor, so that they lose not the sum, though they lose their Rents; but Tacksmen lose all, if their Tack-duty be not payed: and as to their offer of compring, that being only competent after the first year, it could not be objected thereafter, and the danger was past before the offer.

The fourth Degree of Usury with us, is to take Bud or Bribe for the Loan of Money, or for continuing it, when it is lent, whereupon many Debates do arise. The cause why the Debitor gives a gratuity to his Creditor, being oft *actus animi*, is hard to be proven. But generally it is sustained that a proceeding Treaty must be proved, or else it must be proved, that the Receiver is *manifestus*, that is an ordinar Usurer, for else to receive a gratuity is no Crime; And it were against Reason, that by lending Money to my Friend, I should become incapable of a Donation from him.

V. The common Law also sustains it to be Usury, if a man Wadset his Lands, and in the Wadset provide that it shall not be lawful to redeem betwixt and a definit time, for in that case it presumes that the Wadset granter adjects this because of some known Advantage, and this is to take more Advantage for Money than the Annualrent. *Molm. de Censu*. But this the Lords would not sustain to be Usury. Nor did they find it an unlawful Paction, in the Action betwixt, Sir John Drummond and Achierry. And in effect these Pactions are allowed by Act 62. Pa. 1. K. Ch. 1. Sess. 1.

By the Civil Law, it was Usury to take Annualrent for Annualrents; at least it was declared unlawful, *l. ult. C. de usur.* And I conceive that to swell up Annualrents thus, beyond what the Law allows, would infer Usury with us: for else the Law might be thus cheated. But though by the Civil Law it was unlawful, and Usury, to accumulate Annualrents with the principal Sum, and to make both bear Annualrent; which was called *Anatocismus*, and is discharged, *l. 28. C. de usur.* yet with us, such pactions are most lawful: For since, if the Annuals had been payed, they had born Annuals, why may they not be lent out to the Debitor, as well as to others.

VI. The probation of Usury is, either by Writ, Witnesses, or Oath, as to Writ it may be doubted, how the Pursuer may recover it for instructing his Libel, & the Writs being ordinarily in the Usurers own hand, & *nemo tenetur edere instrumenta contra se*. And yet I find Lavvyers very clear, that *hoc casu tenetur edere contra se*. Bartol. & Doctores ad l. prator §. *Is etiam ff. de edendo*. Arelat. de heretic. notabil. 21. And seeing with us, Usurers are obliged to sweare, against the common Criminal Rules, because of the Obscurity of the Crime, why should they not be obliged to produce their Writs, for the same Reason? and as to the former Maxime, that *nemo tenetur edere*, &c. It may be answered, that it holds not in criminalibus, for we see that in improbations, the Pursuer will force the Defender upon an alledgeance of falsehood to produce all his writs, and why not in Usury? Yet I know that it is ordinarily advised in such cases to raise an exhibition.

As to the probation by witnesses, It is doubted if the Debitor who borrowed the money may be received as witness? seeing he is *socius criminis*, it being unlawful to take as well as to give upon Usury, but with us these are

received, as *Hissleside* in *Somervell's* case, 18. Jan. 1667. But thereafter the Justices declared that they would not sustain the Debtor to be a Witness 11. November. 1667. His Majesties Advocate *contra Wilson*: and that because by the 7. A<sup>d</sup>. P. 16. K. J. 6. It is appointed that Usury shall be proved by the Oath of the Party Receiver of the unlawful Annualrent, and Witnesses insert, without receiving the Oath of the Giver of the unlawful Annualrent, for eviting Perjury. Nor will the Justices sustain as a Reply, that the Giver of the unlawful Annualrent in this case had payed the Sum, and so was no more Debtor, and could expect no Advantage, and so the fear of Perjury ceased. And as to the foresaid seventh A<sup>d</sup>, It was answered, that it was only made not to exclude the Debtor absolutely, but to correct the 257. A<sup>d</sup>. 15. P. K. J. 6. Whereby the Oath of Party was declared to be receivable as decisive of the Cause. As to other Witnesses, our ordinar Distinction is, that pactions in Usury are either extrinsick to the Bond, or Writ, as are the taking Bribe or Bribe for continuing a Sum, and these may be proved by any Witnesses; albeit by the foresaid 7. A<sup>d</sup>. It is said that Usury shall be proved by the Oath of the Party, and Witnesses insert. But Pactions which concern the Writ itself, as that whereby more is promised than is contained in the Bond, these cannot be proven, but by the Witnesses insert, for else Writ might be taken away by Witnesses. As to Oath of Party, it is ordained to be taken by the former A<sup>d</sup>s against the common Rules of Law, by which, *nemo tenetur jurare in suam turpitudinem*: And the Justices accordingly do force the Pannels to swear, as in the case of *Wilson* above-cited. But it may be doubted if this A<sup>d</sup> should not extend only to Civil, and not Criminal Cases; For that A<sup>d</sup> says, that *Litis-contestation* being made, it shall be lawful to receive: But so it is that there is no *Litis-contestation* in Criminals. Ergo, This A<sup>d</sup> cannot be extended to these cases.

VII. Usury was allowed by the Civil Law, as the proper Product, or *proventus pecuniae*, but by the Canon Law, it was punished, and most Lawyers think it may be punished criminally, *Decius Consil.* 130. And it is called *crimen utriusque fori*, because it is punishable Civilly and Ecclesiastically.

The pain of Usury with us, is, That the Debtor shall be free from his Obligation, or have back his Pledge, or if the Debtor conceal, then the Revealer shall have Right to the Sums, A<sup>d</sup>. 222. K. J. a. 6. Par. 14. And by the 248. A<sup>d</sup>. P. 15. K. J. 6. It is appointed that the Usury Bond or Contract shall be reduced, and being reduced, the Sums shall belong to His Majesty, or his Donator; and the Party to have Repetition of the unlawful Annualrent payed by him, in case only he concur with the Donator in the Reduction.



## TITLE. XXV.

## The Bribing, Partiality, and Negligence of Judges.

- 1 *What is Bribing by the Civil Law.*
- 2 *What by our Law, and how our Law punisheth it.*
- 3 *Crimen repetundarum & Barratriæ.*
- 4 *Whether Arbiters, Delegats, or Assessors, be punishable for taking Bribes.*
- 5 *How negligent Judges are punishable.*

**I**T is to no purpose to make good Laws, if the Execution of them be not committed to just and diligent persons, as it is to no purpose to have an exact Ballance, if that Ballance be not put in a good hand : and therefore, as the Law hath been very liberal of its Priviledges, to just Judges, and severe in punishing such as offended them; so it hath punished with the same rigour, such Judges as transgress either by Bribing, Negligence, or Partiality which are three distinct Species forbidden by the Common Law and ours.

I. Bribing is the taking of Money, or other good Deed, either for doing of Justice, or committing of unjustice.

There are indeed some Lawyers who think, that a Judge taking Money in a Civil Cause, to do Justice, doth not thereby commit a Crime, but is only lyable to Restitution, *Menoch. 2. Arb. 342. n. 6.* But this is expressly contrary to sound Reason, since if taking upon any terms be allowed, the Law may be eluded, and Judges will be thereby tempted, not only to take Bribes, but to take pains to justifie what they have done : but yet I think that this opinion is neither proved, *per l. 4. ff. de l. jul. repetund.* For there it is not only said, *non excipiet quo magis aut minus quid ex officio suo fecerit*, which prohibits only an excess in justice, and not the doing Justice for Money; nor *per l. 3. c. eod.* since that Law doth only in the general forbid the taking of Money, but this is expressly forbidden *l. 2. §. 2. ff. de condic. ob turp. caus.* where it is declared a Crime, but the punishment there seems only to be *litam suam facere* and *Skeen ad Stat. 25. Wil.* says, that *non licet judici vendere judicium justum.*

II. By our Law, the Kings Judges were to thole an Affize upon what they had done as Judges; and if they were convicted, they were to be punished by the King and his Council, according to the measure of their fault, *Cap. 13. Stat. Rob. 2.* and the Judges of inferior Courts, such as Regalities, were to thole an Affize before the Justices, and if they were found either culpable or remis, they were to escheat their Moveables, and their Life to be in the Kings will, or in the will of the Lords of the Regality, *cap. 14. ibid.*

And by the 26. *Aff. Fa. 3. Parl. 5.* a Sheriff, or any other Officer of Fee, that isto say, any Heritable Officer, is to be put from his Office for three years, if he be found partial; and an ordinary Judge, if he be found partial, loseth his Office for ever. And though his person's being punished at the Kings will, and the paying of the expence of the party injured, be only added to

the punishment, expressed against a Judge who is not Heritable; yet I conceive, that being added in the last place, it is applicable, both to the Heritable Judges, and others. Likeas, it is observable, that though by all these Acts, the King and his Council are only exprest to be the Judges competent; yet *de practica*, the Justices are Judges competent if partiality be committed in any criminal cause, as for instance, if a Sheriff should execute any Pannel, upon a crime proved only against him, by the pursuers brothers, or other inhabile witnesses, or upon a Libel, which were palpably irrelevant; in these, and in such other criminal cases, the Justices and not the Council, would be only Judges competent; nor is partiality in civil cases, a crime by our Law, though it be punishable by this Act, *pena arbitraria*: and by refunding of the damage sustained by the pursuer.

The foresaid Laws strike only against partiality, in general, but bribing is expressly discharged, by the 25. Chap. Stat. K. William, but there is no punishment there exprest; and therefore Sken adds in his observations, the punishment of *l. 1. cum authent. c. de pen. judic.* And thereafter, by the 22. Chap. 1. Stat. Rob. 1. all Judges are forbidden to take Land, or any thing else to Champart, either for giving, deferring, or prolonging of Justice: and the offenders are to be in the Kings will, and to lose their Office for all their life. Champart is a French word, signifying *part du champs*, a part of any Land; so that by a Metaphor, the taking any part of the advantage, arising by any plea, is forbidden by this Statute, which the Civilians call *partum de quota litis*. By the 104. Act. 7. Parl. J. 5. consulting or giving partial Judgement, is declared bribing in a Judge, and such as diffame them as bribers are punished, *lege talionis*.

But because these Acts were not clear against bribing; therefore by the 93. Act. 6. Parl. J. 6. the taking of bribes, is discharged to the Lords of Session, their Wives, and Servants, under the pain of Infamy, deprivation, and confiscation of all their Moveables; to all which, an arbitrary punishment is adjected.

It is very observable, that by this Act, not only the taking of bribes is discharged, but even the taking any goods or gear, during the depending of a Plea; or from such, as shall have causes depending for the future: and though it seemed very reasonable, that men should not be discharged of the effects of their friends liberality, and should not be, by being elected Lords of Session, put in a worse condition, than the other subjects; yet so jealous is the Law of Bribing, that it is afraid, that if Judges be allowed, to take at any rate, or upon pretext of their friends liberality, they might abuse this pretext to meer bribing, *l. ult. c. h. t. l. 4. ff. eod.* And yet the Glosse, *ad l. 1. ff. h. t.* allows a Judge to take from his relations, within the sixth degree; nor is it lawful to take any thing, even by way of remuneration, though remuneration be rather a paying than a gifting, *Matheus P. 619.* But I conceive, that this must be understood, of a remuneration made for services, done during a Plea, or upon the accompt of a Plea, or upon any publick accompt. But it seems against reason to think, that if a brother, or brother in Law, should entertain his brothers Family, whilst he is a Judge, that he may not receive a remuneration for that, or the like kindness.

The second Observation from this Act, is, that it is not lawful for their Wives, or Servants, to take Bribes, or good Deeds, which is consonant to *l. 1. C. h. t.* By which the Judge is lyable to pay the Quadruple of what his Servants take; but it would appear, that none is lyable by this Statute, for what his Servants take, except he know that his Servants take by Command, or Ratihabition; For this Statute discharges Judges to take by themselves, or their Wives, or their Servants, which implies some Act of the Masters; for *qui facit per*

*per alium facit per se*, but he who is absolutely ignorant of what his Servant<sup>s</sup> doth, cannot be punished for anothers Fault, against the Common Rules of Law, else the Master should be made a Slave to his Servants, who might at their pleasure force him to what he decided, or else by taking Bribes, might ruine both their Masters Estate and Reputation.

Since this Statute discharges only the Lords of Session, it may be doubted, if it should extend to Bribes taken by other Judges: For Laws in criminal Cases, use not to be extended; and since the Lords of Session may by bribing, do more injustice, and prejudice the Liedges more than others, it may be alledged, that other Judges ought not to be so severely punished as they; and yet since the Crime of Bribing is punished by the Civil Law, and Law of Nations, in all Judges, it seems just to extend this Act to all Judges; and the rather, because though, *lex julia* was made *contra principales magistratus*, yet it was by the Roman Customs, extended, *ad magistratus urbanos*, Math. P. 617.

III. The taking of Bribes, or good Deeds, was punished by the Civil Law, *Per l. jul. repetundarum*. By which, *tenebatur qui in magistratu, potestate, curatione legatione vel quo alio officio munere ministeriove publico, quid acciperit quo magis aut quo minus officium faceret, l. 1. 3. 4. 6. ff. de l. jul. Repet.*

The punishment of *crimen repetundarum*, was death, if Money was taken, to pronounce a capital Sentence unjustly, *l. 7.* or Banishment, and Confiscation of Goods, in case no such Criminal Effect followed, *ff. 38. de penis*, and though some Doctors teach, that albeit it be capital to condemn an innocent Man, yet to absolve a guilty Man who deserved death, is only punishable by banishment: But if the Judge received Money, or committed gross Iniquity, that should be punishable by death also, for *l. 7. h. t.* doth not distinguish these two cases.

This Crime is by the Doctors, called *baratria*, *nam baratriam committit qui propter pecuniam justitiam baracat. Farin. 2. 3. art. 10.* And they conclude, that by the present Customs of Nations, it is only punishable arbitrarily, not exceeding Banishment, *Boff. de Offic. corrupt. num. 6.*

He also who corrupts the Judges, is punishable with the punishment of falsehood, *gloss. ad l. qui explicandi. C. de accus.* Which holds, though the Judge accept not the Bribe, he is punishable, if the endeavour *pervenit ad actum proximum*, *Mench. de arb. cas. 343.* He also who corrupts the Judge, or Clerk, loses the Cause, *Far. num. 126.* But I differ from him, in that he thinks, that a Pannal who corrupts the Judge in a criminal Cause, ought not thereafter to be allowed a Liberty of proponing a Defence: For an innocent man may by fear be driven to offer to redeem his own Life, to which Inclination, the Law indulges very much.

The Judge who judges unskilfully, *per imperitiam*, is punishable by a Fine, beside that, he pays the Expences of the Plea, *l. fin. de var. & exter. crim.* But *Boffin* and others, are of Opinion, that he is never to be corporally punished; and by the 17. *Act. 6. P. 7a. 2.* Only such Judges are to be punished, as trespass wilfully in their Office.

Arbiters bribing, are punished as other Judges; but some Doctors do justly conclude, that Arbiters are not lyable for their unskilfulness; since they were chosen by the Parties, who should blame their own Election?

Delegat Judges, such as these, to whom the Lords recommend Perambulating of Marches, are punishable for Bribing, but for the same Reason, they are not punishable for their unskilfulness.

Assessors taking Bribes, are also punishable, but some think them not punishable for unskilfulness, since the Judge is not obliged to follow their Opinion: And though some think, that an Assessor, getting a Salary, is lyable even



for his unskilfullness. *Curt. Jan. ad. l. 2. ff. quod quisque juris*, and he should have known that he was named Assessor, to supply the unskilfulness of the Judge. Yet I differ, for he gives only his Advice, and so is lyable only as an Advocat is.

V. Judges negligent in putting Laws to execution, are punishable for their Remissness and Negligence, *C. 14. R. 2.* by the escheating of their Movables, and their Life is to be in the Kings Will, which seems too severe a punishment for meer Negligence; but by the *26. Aft. 5. Parl. Ja. 3.* A Judge found culpable, (which Word may comprehend Negligence) is to be put from his Office for three years, if he be an Heretable Officer: and if he be not Heretable, he loses his Office. Which Distinction, I find also observed by *Bald. ad l. municipia. ff. de serv. fugit*, where he says, that *pro negligentia iudex remouetur ab officio, sed hoc non tenet in iudice perpetuo*, and *Farin. Q. 3. n. 423.* is of opinion, that *maiores officiales non remouentur, sed minores facile remoueri possunt.*

## TITLE XXVI.

### Deforcement.

- 1 To whom was the Execution of the Law committed by the Romans, and to whom by our Law.
- 2 What is Deforcement; and what are the several Degrees thereof.
- 3 The Messenger must have his Blason, and give an Execution of Deforcement.
- 4 Whether may a Messenger be deforced, who wants his Caption, or transgresses his power.
- 5 What Witnesses can prove a Deforcement, or if the Messengers Execution can prove it.
- 6 These who deforce, may be pursued Civilly for the Debt.

**L**aws are only the Idea or Picture of Justice, but Execution is its Life; and though those who have the Execution of Laws and Sentences committed to them, be ranked but amongst the lowest Servants of Justice; yet they have the happiness to be these who compleat that great Work, and amongst whose hands it becomes perfect; and therefore the Laws having committed its most excellent part to them; it should be, and is, in a most eminent way careful of them, and in providing for their safety, it secures its own honour.

I. The execution of Sentences was committed amongst the Romans to the apparitors mentioned of the Codex, in three several Titles, and these were erected in a Colledge, which was stiled, *collegium*, or *familia apparitorum*, as our Heraulds are in a fraternity, by the *125 Aft. parl. 12. K. 3. 6.* The Italian Doctors call them now, *Beroarii*, so that these who would know what the Doctorshold in cases of Deforcement, must look to the Indexes, at these VVords. According to the Roman Law, it was a species of lese-majestie, to resist the execution of Sentences, *l. quisquis ad l. Inl. majest. l. Julianus, ff. de officio ejus cui mandata est jurisdictio*, and *Guid. Pap. Quest. 557.* observes that from these Laws does rise the pratique of France, *que ponuntur capitaliter verberantes apparitores, in executione officii: nam qui mandata principum exequun-*

*ut videntur viva principum imagines ac adeo graviter puniri debent ac injuriantes Statuas principum.*

With us the execution of sentences, is committed to Heralds, Purservants, Messengers, Macers; and the execution of sentences of inferior Courts, to the respective officers of these Courts; and the resisting, beating, or wounding of these, in the execution of their office, is in our Law that Crime which we call Deforcement, *Leg. Burgal. cap. 135.*

II. Deforcement then is defined to be that Crime which is committed in opposing Macers, Messengers, or any others, who use to execute sentences, whilst they are executing their office; And upon that accompt: so that if either the Officer was not in execution of his Office, or if the Officer be beat upon any other accompt, as if a scuffle should arise occasioned unjustly by himself, this would not infer a deforcement, as shall be said hereafter.

Though this crime be amongst the most atrocious, because the King and Sovereign power is in their person despised, (and therefore this crime is called *Dispestus Regis. Stat. Williel. cap. 4. verse 5.*) and Justice is after much pains taken by the Judges, and expenses layed out by the parties disappointed; yet it is only punished by confiscation of moveables, and an arbitrary imprisonment, and the one half of the moveables so escheated, falls to the King, and the other half to the Party at whose instance the Letters were execut, *J. 6 P. 12. cap. 150.* The words whereof are, If an Officer of Arms, or Sheriffs in that part, or other person whatsoever be deforced, molested, invaded, or pursued, to the effusion of their blood, by any person or persons, whom they shall Summon, or others of his causing and command, the time he is executing of any Summons, Letters, or Precept direct by his Highness, or other Judge, &c. at he shall lose, &c.

From which Act it is to be observed, 1. That Deforcement is committed by troubling of any Officer belonging to any Court. 2. That those words, (to effusion of their blood) seem to be a quality put in a sentence by it self, and so may be thought to relate to all the former words, *molested, invaded, or pursued*, yet the words of the Act are only wrong pointed, and these words, *or pursued to the effusion of their blood*, should all be put in one sentence, for, *de practica*, simple opposing or molesting the Messenger, tho' without blood, will infer a Deforcement. 3. Though by the Act it would seem only these against whom Letters, and Charges are raised, or such as they hound out, can be guilty of Deforcement, yet if any others do deforce a Messenger, though they be neither the parties interested themselves, or hounded out by them, yet they are likewise guilty of Deforcement: As is clear by the *4. cap. stat. Williel. vers. 1.* And by the *84. Act 11. Parliament K. J. 6.* And seing the Crime lies in the opposition to the Messenger, whoever is guilty of that Act commits this crime. 4. Though this Act make only causing or commanding, a crime, yet certainly if any person interested does ratihabit the Deforcement committed by any other person, by either giving him good deed, or by receiving his Letters, or Blason taken from him, he is *eo ipso* guilty of Deforcement: As the Council found in the case of the Earl of Seaforth, against the Lord Mackdonald, anno 1689. upon full debate: In which case the Council did ordain, that for the future, all Land-lords in the Highlands should be lyable for deforcement committed upon the grounds, if they did not deliver up the offenders. 5. Though the execution be disappointed and stopped, yet it is declared by the Parliament to be as sufficient as perfected: and it were unjust, that the party having done all that in him lay, that the disappointment, *eo casu*, should be prejudicial to him. 6. Seing the punishment of this act, is only confiscation of Moveables, and imprisonment; whereas by the Act 48. 11. Parl. K. J. 6. The lives & goods of the offenders were to be in the Kings

will; It may be doubted whether the Judge may punish by either of the Acts, seeing the last does not expressly abrogate the first; or whether both should stand in vigour and force. Concerning which question, the general Lawyers have very many learned debates, but the most solid and approved conclusions are, that when a crime is punished by several pains, in several Laws, or Acts, which Acts do not derogate one from another expressly, that it is in the election of the Judge, to punish the delinquent, by either of the pains, *l. quoties ff. de actionibus & obligationibus*. But the Judge making election of one of the pains, cannot thereafter make use of the other: *l. ff. senatus de accusationibus, vid. Cabal. resol. Criminal. cap. 3*. Where this general question is fully handled; and to the considerations there adduced by him, I would add this, that where there are several punishments appointed by Laws, whereof the one derogates not from the other, that the Judge should follow that of the two which is most in use: And therefore seeing confiscation of moveables and imprisonment, is always used in this case, that punishment should be certainly followed by the Judge: for since custom may antiquate Laws, and is a warrant for a Judge, to proceed criminally where there is no Law; it should much more determine betwixt two Laws, which of them should be followed: But there is the less difficulty in this case, that none of the acts makes Deforcement to be capital. And these words *that their lives shall be in the Kings will*, do not inter *de jure*, the pain of death, as is elsewhere fully debated: but it may be doubted, if their persons may not likewise be punishable, seeing not only by the former Act are their lives to be in the Kings will, but likewise by the seventh Act, 17. *Parliament* 7. 6. It is declared, that Deforcement of Officers shall be punished by the Escheat of their moveable goods, and punishment of their person according to the Laws of before: So that there is *geminatio legum*, which makes the Law much stronger: And I remember that some Sea men in *Bruntisland*, having rowed off their Boat when the Customs Officers were about to poynd some unfree goods, bought out of Captain *Dewars* ship, by rowing off, of which Boat the Messenger who was to Poynd, fell in the Sea: The Commissioners of the Thesaury did summarily in *July, 1669*. ordain the Sea-men to be whipt which was accordingly done.

III. Messengers have as the Badge of their Office, a Blason bearing the Kings Armes, and a Wand of Peace: If they bear not the Blason, it is believed (and that is the first objection against the conception and relevancy of the Libel) they may be deforced, because by that act only people are obliged to know that they are Messengers, and the Wand of Peace is that whereby they touch a Rebel, and declares him to be their Prisoner, and when they are deforced, they use to break the wand of Peace; but though their Libel bear always that the Wand of peace is broken, yet if the troubling of the Messenger be proven, though this quality be not proven, the Assize will still find guilty, as was found in the case betwixt *Murray* and *French*, 13. *July 1669*. where it was likewise found that albeit ordinarily the Messenger who was Deforced, doth give in with his Libel, an execution of Deforcement, wherein after the ordinary form he relates how he execute the Letters, and how and by whom he was Deforced, yet that execution is not absolutely necessary for proving the Deforcement, but that the Deforcement may be proven by witnesses; for else there could be no Deforcement, if the Messenger were killed, so that he could make no execution: or if he were bribed by the Deforcer, and so would give none, but that an execution of Deforcement was only necessary to the effect the Letters might be reputed as validly execute, as if they had been really execute.

It uses sometimes to be alledged against the relevancy of the Libel in this crime, that the Libel is not relevant, because it bears not that the Messenger had the



the Letters of Caption in his hand, & shew them to the party whom he apprehended by virtue of that Caption, for without seeing of the Letters, the Party is not obliged to obey, and if it were otherwise, any man might take a free Lidge, and keep him till he should get a Caption, though he had none at the time of the execution. But upon the 19. of February, 1672. Gordon of Braco was found guilty of Deforcement, though the Messenger his having a Caption, was neither libelled nor proved, and that because the Rebel did not crave to see a warrand, and the Messenger was answerable if he did execute without a warrand: Neither did the Lords think that the Messenger was bound to put the warrand in the Rebels hands, lest he should destroy it: but he was bound to shew it to any disinterested person who was present. In the same Process it was likewise found, that a Messenger might execute a Caption under silence of night, though it was pretended that this might give a colour to Robbers to enter into honest mens houses under night, upon pretext of executing of Captions; though Poyndings indeed cannot be execute after the Sun is set, because a Poynding is a sentence, and requires *formam judicii*; & no Court can be kept under silence of night. Some Judges ordain Officers to take Raes from a Mast, and arrest Ships, without a written order, the haste of the execution so requiring; and therefore I think that though such have not a written warrand, they cannot lawfully be opposed; for it is the duty of all good Subjects to enquire first if he who pretends to have authority, have it already, though he see no written warrand, but not rashly to oppose what may be lawful.

Another ordinary objection against the Libel is, that the Messenger and his assistants did transgress their power and warrand, and so it was lawful to resist them: And thus upon the 18. of November 1667. Mr. Archibald Borwick being pursued for deforcement, it was alledged, that he appeared as Procurator for the Lord Borwick, who had arrested Sandilands, and the Tennents Corns, as Master of the Ground, and so alledged the Messenger could not Poynd the Corns till the Master was payed, wherein the Messenger did unjustly, and so he had good reason to stop the Poynding: This alledgeance was found relevant, but if justly, it may be doubted. And Lawyers are very positive, that no man can stop any execution, upon such pretence of injustice, where the injustice can be otherwise redressed, by appellation, or otherwise: which they call *resistentia licita per subsidium*, Menoch. de recuper. possess. remed. 8. num. 30. & 31. Cabal. resol. crim. cas. 132. And their opinion seems most just; for it were dangerous, to make privat persons and such also as are interested, Judges to the Justice of what is done against themselves. 2. *Nunquam recurrendum est ad remedium extraordinarium quamdiu locus est ordinario*; but so it is, that if a Messenger do any wrong in the execution of his Office, he is lyable therefore, *ad damnum & interesse*, and finds caution for that effect to the Lyon at his entry. 3. Messengers are Judges in poyndings, and it is not lawful to resist Judges upon pretence that they Judge unjustly: And this suggests to me another distinction, which is, that either a Messenger or Executor doth wrong the party interested, *via juris*, as in omitting formalities, and repelling just allegiances, & *eo casu* he cannot be resisted: or else he does wrong, *via facti*, by beating the party he cites, or giving him opprobrious speeches, by apprehending him without a Caption, or after a Suspension is produced by him, or otherwise giving rise to the violence used against him, & *eo casu* he may be resisted, as was found, Mart. 1662. And is clear from the Doctors, Cabal. *ibid.* It hath been alledged that there could be no deforcement at the Messengers instance against the Pannel, for stopping him to poynd goods, because the Messenger was the person at whose instance the Letters of Poynding was raised, and therefore he could not execute them himself, seeing no man can be Judge in his own cause and the Messenger is Judge in all poyndings; but this was repelled, because

the Letters of poynding, are always blank in the persons Name to whom they are direct, and so the Messenger might fill up his own name, and no Messenger was excluded, and if the Executor did any wrong, he was lyable to a spuilzie, and his sentence was reduceable; but this wants not its own scruple, seing Messengers are Judges when they poynd, and no man can judge in his cause. 2. It was here alledged, that the Letters upon which execution were used, were suspended, and so could not be put to execution; which alledgiance was repelled, because the suspension was not intimate, and so the Messenger nor party was not thereby put in *malafide*, *Mart.* 1662.

Though this be the punishment of deforce, when it is purely such, and is not aggravated with other hainous circumstances, yet if a Messenger were executing Letters of Caption against a Traitor for Treason, any who would deforce him would commit Treason, and that were to be art and part of Treason: and so in other Crimes; but whether Deforcement may be punished in our Law as breaking of Prison, I doubt very much, though it be a rule amongst the Doctors, that *eximens aliquem ex manu familia & ex carcere à pari procedunt & carceratus dicitur non solum qui in carceris mansione degit, sed & qui satellitum custodia, & in familia manu reperitur: nam eodem modo utriusque laditur majestas principis, & offenditur ministerium justitie*, *Cabal. resol. crim. cent. 1. casu. 8.*

V. Deforcement then is proven as other Crimes, by Witnesses, and who ever may be Witnesses for proving other Crimes, are admitted here, but it hath been oft doubted, whether the Witnesses who were carryed along with the Messenger, for verifying his Executions, may be sustained as Witnesses to prove the Deforcement: and the reason of the Doubt was, because ordinarily they are injured themselves in such cases, yet at last it was decided in *March* 1662. That they were very receiveable Witnesses, because without these, Deforcements could not be proved: And since the Execution could be proved by them, why not Deforcement. But it is a necessary Caution in that case, that no injury be pursued as done to the Witnesses, for if that be once libelled, they become Parties, and will not thereafter be received as Witnesses, though they should offer to pass from the Injuries, as done to themselves. And these Witnesses are so receiveable, that in the case betwixt *Murray & French*, 13 July. 1669. It was found that though they were within the Degrees Descendent to the Pursuer, yet they might be received, because in effect they were *testes instrumentarii*, being witnesses contained in the execution of the Deforcement; but I think, this is debateable, because *testes instrumentarii* are only allowed in Obligations, though within Degrees, *quo casu*, they are to be presumed to be chosen with mutual consent, which cannot be alledged here, seing the Messenger only chooses such Witnesses as he pleases.

Whether the Execution of Deforcement, will prove that the Messenger was deforced, without leading any other Witnesses, it may be doubted; and that it should, appears from these grounds. 1. That it is a Principle in Law, that *creditor nunciis, in his que spectant ad ipsorum officium*. 2. In civilibus, The Execution of a Messenger is always believed till it be improven. 3. Lawyers are very clear, that *creditor nuncio, si referat se fuisse percussum vel verberatum in ipsa executione*, which *Guido papa decis. 628.* declares to be the Custom of France in Dauphinie: And this is enacted by a Statute of Florence. 13. June. 1559. Yet by our Law the Execution of Deforcement, will not prove that the Messenger was deforced, and *Cabalus* declares this likewise of most other Nations besides these above-cited, *Casu. 127.* According to our Law, the Messengers who were deforced, cannot be led even as single Witnesses, though the Pursute be not at their own instance, but at the instance of the Party injured, or his Majesties Advocat: In which case it seems that all their interest ceases; but the reason of this is, because it is presumeable that the Parties who were wronged will stil retain a Resentment against the Injurers, and

and so will still be prejudicial Witnesses in that case. But yet according to the Doctors, this is doubted, and many of them conclude, that *creditur nuncio se verberatum fuisse, nam creditur ei secundum omnes in iis, quæ pertinent ad suum officium & hoc est complexum relationis executionis sibi demandatae*. Menoch. de Arb. cas. 112. alii vero credunt casum hunc esse arbitrarium. And according to our Law, such as were witnesses, chosen by the Messenger to go alongst with him in the using the Execution, will still be received Witnesses, though they were themselves beat in the Deforcement, and so are lyable to the former Suspicion equally with the Messenger: And the only reason of difference that can be assigned, is, that the Messenger is himself said in our Law to be deforced, and so is the person formally interested, but Witnesses are not in our Law said to be deforced, and though they be received ordinarily, yet it is given as a Caution, that they shall not depone upon any wrong done to themselves, for if they do, it will make them though otherwise habile, to be rejected from being Witnesses, and the Law will *eo casu* look upon them as persons that remember to much the Injury done to them; It may be likewise in this case doubted, whether though the Witnesses taken along by the Messenger to the Execution, cannot be rejected upon that accompt, after they have purged themselves of partial Council and Malice, if they may not be rejected, if before they be sworn they confesse, they continue to have a Relentment of the Injury done them. And in my opinion, if this beating and injury suffered by them, be confest by themselves, before they be purged of partial Counsel, they shall be rejected, though the Parties interested, and at whose instance the Letters were execute, cannot be received Witnesses to prove a Deforcement, even though they should declare that they would never pursue the Deforcement, *ad propriam interesse & vindictam*: yet such as were within Degrees descendent to the Party, were received Witnesses, even where the Pursuite was pursued by their own Friend. 13 July. 1669. Murray against French. Upon a new pretext, that Brothers and Servants, &c. are habile Witnesses, where they are *testes instrumentarii*, and Witnesses in Executions are *testes instrumentarii*: But in my opinion there is a great difference betwixt these two, for the reason why *testes instrumentarii* are received, though they be otherways *inhabiles*, is because they are chosen of common consent of both Parties who are present at the Subscription; but that cannot be alledged in such as are Witnesses in Executions, who are only chosen by the Messenger himself.

After this Crime is proven, the ordinary Verdict is, the Assize finds the Pannel guilty of Deforcing such a Messenger. But yet where the Assize find only the Pannel guilty of troubling the Messenger in his office, and would not find him guilty of deforcing: The justices found these terms to be equivalent, and punished the Pannel as a Deforcer, in the case of Robert Herries, July 1667.

VI. The party Deforced, has beside this Criminal action, a civil action for deforcement against such as have been accessory to the Deforcement, for payment of the debt: which debt is ordained by the 117. Að. 7. Parl. Ja. 6. to be payed, together with the modification of his expenses out of the first and readiest of the Deforcers escheat: And it is declared, that he shall be preferred to the King. From which Act these two doubts may arise, 1. Since by the Act it is declared that the persons convict of deforcement, shall be lyable for payment of the Debt, by this Civil Action, that therefore this Civil Action is not competent, until the parties pursued be first found guilty of deforcement: But yet it was found, the 25. of July. 1663. in the case of David Mitchel, that the party injured might pursue, either Civilly, or Criminally; and that this privilege was introduced by that act, as a further advantage to the party deforced; but because this Action was founded upon a Criminal ground, there



fore they ordained the Deforcement to be proved by most unsuspect Witnesses. The second doubt is, whether by this Act, the Deforcers other Estate be lyable to this action, as well as his Moveables? And though it may be urged, that that Act appoints only the Creditor to be preferred to the King, and to be payed out of the first end of the deforcers Moveables. Yet it was found, the 13. of December, 1672. in this case, *Murray against French*, that this Act did allow Action for payment, *simpliciter*. For the Lords thought, that the Act did in the first place ordain payment of the Debt, and expense; that the preference was a new superadded privilege: And it were against all reason, that the Creditor should be frustrat of his Action, because the Deforcer had no Moveables, though he had an opulent heritable Estate.

In this case it was likewise found, that the party deforced might pursue, either *ad vindictam publicam*, Criminally; or might pursue Civilly this Action for damage and interst; and that the one Action did not consume or exhaust the other: And therefore though the Pursuer here had prevailed in a criminal pursuit against this Defender, *quoad vindictam publicam*, that yet he might pursue this Civil action for damage.

## TITLE XXVII.

### Falsum, Falshood.

- 1 The several species of Falshood by the Civil Law.
- 2 The producers, or users of false Writs, commit Falshood
- 3 The punishment of Falshood by our Law.
- 4 The Lords of Session are only Judges competent thereto in the first instance.
- 5 The Lords proceed in the tryal of Falshood, either summarily, or by way of Action.
- 6 The direct and indirect manner of probation.
- 7 After the Writs are improved, the forger is remitted to the Justices.
- 8 False witnesses, how punished.
- 9 False Coyners, how punished.
- 10 False Weights, how punished.
- 11 The assuming a False Name, & *suppositio personæ falsæ*, how punished.

**F**alshood is by the Civilians, defined to be a fraudulent suppression, or imitation of Truth, in prejudice of another; it was by them divided, in *falsum quod ipsa lege Cornelia vindicatur*, & *quasi falsum quod senatus-consulto & constitutionibus vindicabatur*, Matheus hoc tit. But suitable to our practice, I shal divide Falshood in these four Branches, 1. That Falshood which is committed in Writ. 2. That which is committed by Witnesses. 3. The forging and falsifying of Money. 4. The using of false Weights, and Measures.

I. As to the first Branch, he commits falshood, who either expresseth in Writ, that which was not done, or omits to express that which was done. So that Falshood in Writ may be committed, either in Commission, or Omission. Falshood is committed by Commission, either by fabricating a false Writ, or by signing it, or causing another sign it, *qui instrumentum falsum dolo malo scripserit, signaverit, vel signare curaverit, recitaverit, mutaverit, subjecerit, amoverit, celaverit, deleverit, interlaxerit, resignaverit*, all which species

*Species of Falshood*, are enumerat by *Ulpian. leg. 2. ad leg. Cornel. 9. §. penult. l. paulus Cod. ad legem Cornel. de falsis*, which are prettily exprest, but much more fully *l. 2. Basil. επι ψευδων*. In these terms *δ κλοπας διαδικων, καρπασας η απαισεις, η υπο βαλυν η παρος φραγισας, η πλαγευσας, η σφραγισας η κατα δολος ανεγνωσκων, η δολως παρασκευασ ταυτα, γινεται*. with which, *Theophil. differs much. Inst. §. 7. τινος εστιν δολος η ετερον συμβουλιον γραφοντα η αναγνωτα, η υποβαλλοντα*. And the punishment of Falshood, was very different, according to the several kinds and degrees of guilt, as will hereafter appear.

II. Falshood in Writ, is committed by producing a false Writ, if they know it to be false, which some Doctors think punishable only, if the writ produced by them was suspect; and it is said to be suspect, if either it appear vitiat by ocular inspection, or if the writer or producer used to produce false writs, or if it contain things that are improbable.

The user of false writs is said to commit falshood, *l. majorem Cod. de falsis*. which only holds, if he knew the writs produced by them to be false; and therefore *Clarus* relates a caution used by the practitioners, which is, that the user of the writ gets a dyet affixed to him, to deliver at, if he will abide thereby, and at the day affixt, he must either simply abide thereat, without any qualification, *quo casu*, if it be improven the user is punished as a Forger. Albeit the Doctors commonly are of opinion, that even in that case, the user is to be more meekly punished than the fabricator, *pana scilicet relegationis*, which caution is likewise in use with us; but in this we differ, that by our practice, the user will be allowed to abide by the Writ, though not simply as a writ true, yet as a writ really made over to him; and in the forging wherof he had no interest, as in the Earl of *Levins* case, 1665. but though this qualified abiding at the writ, be allowed in an Heir, or singular Successor, yet that it is only allowed where there is some person extant, who abides simply at the writ, as true as *Kennedy* did in this case, for else the user, though a singular successor, must abide at the writ, as a true writ simply; without which, any false writ might be vented securely.

The counterfeiter of the Kings Letters, for which *Binnie* was hanged. The opener, and unsealers of privat Letters, from which *Bart.* likewise concludes that Advocats, Writers, and others who reveal their Clients Papers to their Adversaries; and, the sealing other mens Letters with the Sealers own Seal; and revealing the secrets of a Town, commit likewise Falshood.

A Nottar who draws any unlawful writ, *verb. gra.* An usury Contract commits Falshood, but not in *Scotland*.

A Nottar who expresseth any thing that is false in an instrument, commits Falshood, as if he say the money was numbred where it was not, or if he marked persons to be present who were not, But with us, a Nottar commits not Falshood, though he say in the writ which he draws, that the money was payed, whereas it was not. I find that *Jacob. de sancto Georgio ad l. de quibus ff. de Legib.* observes, that *consuetudo loci excusat notarium a pana falsi eo casu*.

III. Falshood in writs is committed by omission in not setting down what the Nottar was desired to set down in his Instrument, or omitting to express the day and place when the omitting thereof might have been disadvantageous. In our Law he of old who falsified the King, or his Superiors Charter, committed Treason; but he who falsified only the Charter of a private man, was only to be punished by loss or mutilation of a Member, *Reg. Maj. l. 4. Cap. 13. num. 4. & 5.* or should be in the Kings will, *lib. 30. cap. 8.* But therefore it is determined, *Stat. Alex. 19.* that the forger of a Charter is to lose the right hand; and *Clarus* tells us, that in the *Dutchie of Milan*, and several other places, a false Nottar is only punished for the first Crime, by loss of his hand, but all this is innovat with us, by the 6. Par. 80. *Ass.*

Ja. 5. whereby it is appointed, *That these who make false Instruments, or causes them be made, or uses the same wittingly, shall be punished for the same in their Person, and Goods, with all rigour, according to the disposition of the Civil and Common Law*; But because that Act punished only false Nottars, and exprest only false Instruments, therefore by the 22. *Act. 5. Par. 2. M.* It is extended to all Evidents, but it would appear that it is not extended to all persons, but only to Nottars, both by the rubrick and body of the act; from which it may be inferred that in *criminalibus non est argumentandum a pari ultra casum à lege definitum*. And that criminal Laws are to be most strictly interpret, for else the former Law against Instruments, might well enough have been extended against other false writs, which are oftentimes of greater consequence, than Instruments are. 2. The reason why Nottars are more severely punished than others, was, because they were more trusted than others, for of old they were Church-men, and hence springs that Custom, that they yet design themselves, *Ego. A. B. Notarius pub. Dioeceseos Andreopolitanae, Rossensis, &c.* And any Paper subscribed by them was sufficient, though not subscribed by the Party. 3. The punishment is declared to be Prescription (which is an error of the Corrector, put for Proscription) banishment, and dismembering of Hand or Tongue; but because it is received amongst the Doctors, that a Statute punishing Falshood in a Notar, cannot be extended to any other person who is a forger, *Fulgor. consil. 123.* therefore by the *Act. 22. Parl. 23: Ja. 6.* It is statuted that whosoever maketh or useth a false writ, or is accessory to the making thereof, shall be punished as a committer of Falshood.

And that these and all Forgers of Writs may be punished, albeit they declare in Judgement, that they pass from, or will not use the Writ quarrelled. From which it may be inferred, that seing the Forger is only not allowed by this Act to pass from the Writ, after it is used and produced in Judgement, that before it be used in Judgement, it may be pass from, and as the using in Judgement is a further prejudice, and degree of Impudence, than a simple Forgery which may be repented of; So in all Tryals of Falshood, and particularly in *Barclay's case*, the Lords took great pains to enquire, if the Writs quarrelled were produced in Judgement, or made use of before any Court, which had been unnecessary, if simple forging had been sufficient to infer Falshood: but although this may be alledged, for mitigating the punishment, yet *Dempster* was condemned for counterfeiting a Subscription, in a Reversion, though he never used the same, to the hurt of any person whatsoever, nor would abide thereby; and a Sentence was founded upon this *Act. 20. April. 1620.*

These who give a false Testimonial to any man, whereby it may be used as another mans Testimonial, or forges one to himself, is punishable by death, *Act. 10. Parl. 20. Ja. 6.* But this Act seems only to relate to the Borders, and such Fugitives, as run in from Scotland to England.

Though England and some other Nations, punish Theft with death, and Falshood only by the Pillory, and confiscation of Moveables; Yet our own Law seems much more reasonable, which punisheth Falshood with death. Since Falshood is a Theft, and a degree of that Crime, which deserves a much severer punishment than ordinary theft, because I can secure my Goods against a Thief; but no man can against a Forger. And a Thief can but at most steal our Moveables, whereas a Forger can by a false Writ, take away the Property of our Lands, and things of the greatest consequence.

By the Civil Law *l. 1. ff. de l. Cornel. de falsis, §. ult. pena falsi, vel quasi falsi, deportatio est, & omnium bonorum publicatio: & si servus eorum quid admitterit, ultimo supplicio affici jubetur*, which is in terminis, renewed in



in the Basilicks, only in place of *publicatio omnium bonorum*, the Basilicks have *plena publicatio*, *tamen iniquum*. But Theophil. omits absolutely *publicatio bonorum* and makes it to be simply *restitution*, or capital; the reason whereof seems to be, because capital punishment included necessarily publication, or Estreat of goods. *l. 1. §. 2. ff. de Bon. Dem.* and albeit the former punishment be prest *l. 1.* holds generally in Falsehood; yet there are some kinds of Falsehood otherways punished, because in effect, they fall in to be branches of other Crimes. Thus the assuming of false Arms, *sed qui militiam conficitur concutiendi causa* is capital, in Mathew's judgement, *per l. 27. h. 1.* because it is a kind of *Lesse Majestie*. But I find by the Law it self, that the pain of death is not exprest in that case, *sed pro admisi quatuor gravissime puniendos est*. And by the Basilicks, there is no punishment exprest to that special kind of falsehood, and so it is left only punishable, *tantum falsum*. And though Mathew doth infer this to be capitally punished, from *l. 3. l. jul. Majest.* Yet I think there is a great difference, betwixt a mans pretending falsely that he is a Souldier, which is that Crime which is punished *l. 27. h. 1.* and the taking up Arms against the State, which is punished, *dicta, l. 3.*

I V. Because the Crime of Falsehood, doth oftentimes arise upon Papers produced before the Lords of Session, and because the tryal thereof, requires an exact, and long, and a much more tedious search, than the forms of the Justice Court can allow (whose dyet is peremptory) therefore by the Acts foresaid, it is declared, that the Lords of Session are Judges competent, to the tryal of Falsehood. And albeit that Act doth not expresse their Jurisdiction to be exclusive of the Justices, yet I remember, that in an accumulat accusation of Theft and Falsehood, pursued by the Lord Blantyre, against Macculloch, his servant, it was found by the Justices, that they would not proceed to judge the Falsehood, but remitted the same to be tryed before the Lords, in an improbation, and I believe, that the tryal of Falsehood, *in prima instantia*, doth only belong to the Lords, as that of divorce doth to the Commissaries; for else most of all Falsehoods would be only pursued before the Justices, seeing the tryal there is much shorter, and lesse expensive, than before the Lords: whereas I find not any Action of Falsehood, *in prima instantia*, recorded in all the Books of Adjournal.

V. The Lords do sometimes proceed to the tryal of Falsehood, *summario per modum simplicis quarela*, upon a Bill, without any formal Summons; and thus they found Binnie, a fallary for counterfeiting the Signet, *Ann. 1666*. But this they do only in two cases, 1. When the falsehood is committed, by a Member of the Colledge of Justice. 2. When the Signet or any part of a Process is, *ex recenti falsified*.

The way of procedor in this Crime before the Lords, is this; a Summons of Improbation is raised, and continued, and three terms of old, but now two only are by the regulations given to the defender, to produce the writ called for, to be improved. If the Papers called for be not produced, certification is granted against them, whereby they are declared such as can never be made use of, as true Papers, in any time coming; but upon this presumptive Improbation, whereby the Writs are only *perquisitionem juris*, declared null, the party who is called to produce them, is not repute a forger, or punished as such, for *non constat eo casu de corpore delicti*, or that ever there were any such Paper, as is called for: nor was there ever certification granted, or any further inquiry made, into the Falsehood it self, till November 1669. at which time certification having been granted against some Papers, made by the Tutor of Tamie, to Captain Baucley, the Lords found they might proceed a little further by examining the Witnesses, albeit it was alledged, 1. That this had never been done. 2. That *non constabat de corpore delicti*. 3. That by the certifi-

and, notwithstanding this, the Lords proceeded to the tryal of the said Papers, and certification

certification, *res erat judicata*, and so the Lords, *functi erant officio*. 4. That the writs being improved, were no longer dangerous, *non erant amplius nociva*. *Nullus potest puniri de falso ubi falsum non erat nocivum*; & albeit, it was alleged that it would be very prejudicial to the common-wealth, if a person who falsified Writs might destroy them, when he found they could not be advantageous, and so escape; it was answered, that there was no hazard in this, because, if the forger used them not, the common wealth, nor no person could be prejudged; but if he did, the party injured might force him to leave it in the Clerks hands, and intent an Improbation.

By the 62. *Act*. 7. *Parl.* 2. *M.* the Judge is allowed to exact caution from such as propone Improbation, and though some doubt whether this caution may be exacted, as well when improbation, is proponed by way of exception, as when it is pursued by way of action: yet since the danger is the same in both, and that by the act, this is declared to extend as well, at the raising of the Summons, as at the proponing of the objection, and that *lex non distinguit*, I see no reason for this doubt: and thus, it was decided the 25. of June 1675. The Sums for which caution is to be found in this case, is left to the arbitrement of the Judge, & though this Statute appoints only caution to be found, yet the Lords do ordain the Money oftentimes to be consigned.

VI. There are two ways of improving a Writ, *viz.* the direct and indirect manner, the direct manner of improbation, is by the Writer and Witnesses insert, the indirect manner is by Witnesses not insert, but by presumptions and other extrinsick Arguments. But it is a rule in our Law, that whilst the direct manner of Improbation is extant, that is to say, whilst Writer and Witnesses insert are alive, no Tryal can be taken by the indirect manner.

As to the direct manner, we have this general Maxime, *viz.* that such Witnesses as are dead, are proving Witnesses, but this holds only presumptive, for if of five Witnesses insert, two should improve, the other three being dead, the Writ will be declared false; whereas, if these three were alive, and did formally approve, the writ would subsist, though improven by two.

To prevent Falshood in all manner of Evidents, our Law in place of Seals (which were used of old, and which might have been easily counterfeited) did by the 117. *Act*. *Parl.* 7. *J.* 5. require that all Evidents should be subscribed by the Party, and Witnesses, and by the 88. *Act*. *Parl.* 6. *J.* 6. all writs of importance, are ordained to be subscribed by the principal parties, if they can subscribe, or by two famous Nottars, before four famous Witnesses, denominat by their special dwellings, or by some evident token, by which the Witnesses may be known, and though usually men take writs of the greatest importance, subscribed before any Witnesses, yet there is nothing more imprudent, for if I take a Gentlemans two servants, or a Fathers two Sons (when the master or father are disponers) Witnesses to their Disposition, or Bond of the greatest importance, and one of these should deny his subscription, the writ would be null as was found in Commisars *Fleemings* case, and if both denyed their subscriptions, the writ ought in strict Law to be declared false; but yet if there were pregnant circumstances, and adminicles to astrue the truth of the subscriptions, I conceive the writ could not be improven, even though these interested witnesses should deny their Subscriptions. From the foresaid Acts of Parliament it is clear, that the witnesses should be specially designed, to the end they may be known and examined. And therefore the Lords 21 February, 1672, *Littlegill contra Somervell*, found it not sufficient, that a Witness in a Bond craved to be improven was designed indweller in *Edinburgh*, but ordained even the assigney to condescend more particularly though the assignay contended that he being a singular successor, who had got a right to the bond, he could not know who were the witnesses made use of, nor was he obliged to consider any more when he got his assignation, but that

that the bond had witnesses, without requiring who these were, and so though the cedent who had gotten the bond might be obliged to condescend, yet he could not; and yet improbation being pursued against a bond granted by Sir Lewis Stenart to his Son Kettlestone, in which bond one of the witnesses was designed John Carnagy servitor to the Earle of Southesk, though there were many more John Carnagies who then served the Earl. The Lords found that Kettlestone was not obliged to design more particularly which of the John Carnagies wrote the bond, and that it was relevant for the improver to offer to prove that at the date of that bond the Earle of Southesk had no servant who could write such a bond, 7. February, 1672.

Another great Error committed by such as take men to be Witnesses to the Writs and Evidents delivered to them, is, that they imploy Witnesses who have not seen the Party subscribe, nor has not so much as inquired at him whether that was his Subscription, whereas if that Paper were challenged as false or null, it would be declared null, if not false, though the Witness should depone that he was in the next Room, and it was brought to him immediately whilst the Ink was not yet dry, and that he knew his Masters Subscription, if he could not positively depone, that either he saw his Master subscribe, or that his Master had declared to him that that was his Subscription. And this remembers me of this pretty case wherein I my self was consulted: A Gentle-woman being to subscribe her Contract of Marriage, desired, that because she was ashamed to Write before so many Friends, she might have the Paper delivered to her to be subscribed in another Room, and the same having been sent with her to the other Room, she caused her Sister in Law who went alongst with her, subscribe the same, for her pretending that she could not write well, and returning thereafter, she told the Witnesses that that was her Subscription; Which Contract being thereafter quarrelled upon the Nullity of not being truly subscribed before Witnesses, the Lords sustained the Contract, the matter of Fact above-specified, being offered to be proved, though it was alledged that this was in effect to make up an Obligation of great Importance by VVitneses.

In the indirect manner, the Lords use to consider the Presumptions adduced for the Improver in his indirect Articles of Improbation, and for the Party accused, in his Articles of Approbation, amongst which indirect Articles, the chief are, *Alibi*, a false date, and *comparatio Literarum*. If the Party who has been said to have subscribed the Writ, be proved to be else-where; as for instance, to have been at *Edinburgh*, whereas the Writ is alledged to have been subscribed that same day by him in *Caithness*, this is a very concluding Presumption of Falshood, since a man could not by the swiftest Journey be at both these places in one day, and therefore this is a most concluding Presumption to annul the Bond, but I think it is no convincing Argument which can infer that the Bond is false, since People by Error or Mistake, may, and do oft-times insert a wrong date, neglecting the date, as a matter of no importance, and therefore the Lords did very justly alsoilzie from an Improbation of a Writ, which was proved to be false in the date, since the Witnesses insert were alive, and did depone upon the verity of the Subscription, 23. May, 1667. Lord May, contra Ross, and upon the 10. of July 1669. Gardner contra Colvil, a Writ was not improven, though it was proved not to have been subscribed of the date that was insert; In respect there was a Writ of that same Tenor, truly subscribed that day, which being a-missing, the Granter a long time thereafter subscribed another of the same Tenor and Date, and the first being thereafter found, and both produced, the user abode by the first simply, and by the last as to the verity of the Subscription, but not of the date, which was so



insert for the reason foresaid; so that though the date be amongst the substantial Solemnities requisite to a Writ, as is clear by the foresaid Acts of Parliament, and by the 13. *Act 9. Parl. Ja. 1.* So that the Improver may force the User of a Writ, to condescend upon a particular date, if the date be blank, and that the falseness of the Date will infer the Writ to be false, except this Presumption can be taken off by a strong contrary Probation; yet that it may be so taken off, is clear from the Cases foresaid, and in this sense Craig is to be understood, who says, *pag. 196. Si falsa data appositum, totum instrumentum vitiatum, nam quod in ea data qua exprimitur non est verum, etiam si aliam datam substituere velit, is, qui eo utitur, non est audiendus, & quod in data falsa non fuit factum, nunquam factum presumitur.*

If the Writ craved to be improved be unlike in its Subscription, to the other Subscriptions used by the Subscriber at the time when the Paper quarrelled is said to be subscribed, then it is most suspect, and if both the Subscriptions of the Witnesses and Granter, be found to be one hand Writ, but all of them are unlike the true Subscriptions, then the Writ will be improved by ocular inspection: as was found in the Earl of *Weymes* case, contra *Gall*, July 1675. But yet it were hard to infer the corporal punishment of Falshood from this Probation, which is but at best presumptive, for the Granter of a Bond or other Writ, might upon designe subscribe to Strangers his Name, far otherways than he uses to do, meerly that he or his Heirs, may thereafter quarrel the same, and therefore *Cravet. Consil. 386.* concludes, that *comparatio sola non relevat in criminalibus*, and all Lawyers conclude, that *recognitio scriptura privata inferi plenam probationem si jungatur cum uno teste vel alia semiplena probatione*, *Alex. Consil. 239.*

In the indirect manner, the Lords uses to receive Witnesses *ad futuram rei memoriam*, and to receive Witnesses sometimes by Commission, as in Captain *Barclayes* case. Albeit it was there alledged, that Witnesses in the indirect manner of Improbation, are only received *ex nobili officio*, which could not be committed or delegat, and which seems stranger, the Lords uses to take the Oath of the Defender himself, albeit regularly in Crimes the Defender is not obliged to swear.

Before any Debate upon the indirect manner, the Lords use to ordain the Pursuer to give in his Articles of Improbation, and to ordain the Defender to give in his Articles of Approbation. And albeit there be not *publicatio testimoniorum* in our Law in civil Cases, yet because Improbations have a criminal Effect, & tend to take away the Life of the Defender, therefore the Lords use in this case to Ordain the Depositions of the Witnesses to be seen by both Parties, and both Parties being fully heard to debate *in presentia*, the Lords do either improve or Assoilzie.

If the Lords improve, they have by the foresaid Acts of Parliament power to impose an arbitrary punishment suitable to the Crime. And therefore they do sometimes ordain the Forger, to be taken to the Cross with a Paper-Hat, if the Cheat was but small, or the person in great necessity. And sometimes they only ordain the Forger to be imprisoned, and rebuke him without discovering the Falshood, as they did lately to a Gentleman, who being otherways very discreet, was by his Poverty driven to counterfeit the Subscription of his Friend, to a Bond of Suspension. Sometimes likewise they refer the Forgers to the Council, who upon that reference, use either to condemn the Forger to perpetual Imprisonment, as they did Captain *Barclay*, or else they use to send them to the Mercat-cross with a Paper-Hat, as they did *Tulloch* a Nottar for forging a Charter, 4. July. 1638. But this Mitigation is only allowed, when the Forger hath been induced to commit that Crime by the perswasion of others, or by his own simplicity, and hath ingeniously confest.

VII. The ordinary way of Procedure taken by the Lords, when they have improven the Papers, and found them to be false, is to remit the Forger to the Justices, against whom an Indictment being drawn up, and the Assize sworn, the Lords decreet is read, without repeating any further Probation, and the Assize must condemn thereupon, else they will be pursued for Error. And therefore the Verdict *ea casu* bears, finds the Pannel guilty in respect of the Decreet of the Lords of Session. Upon this Verdict the Justices are tyed expressly to condemn the Defender to be hanged, as *Halyday* for counterfeiting a Discharge, 8. Feb. 1597. *James Tarbat* for being Art and Part of counterfeiting a false Charter. 16. Feb. 1600. And if the Falshood be atrocious, they sometimes before the Execution ordain the right Hand to be cut off.

If the Lords remit not the case to the Justices, when they find the Papers to be false, they ordain the Papers improven to be cancelled in their own presence, but if they remit the Forgers to the Justices, then the Papers are carried to the Justice-Court, and when the Sentence is pronounced there again the Pannel, the Papers are likewise cancelled at the Command of the Justices.

VIII. The second species of Falshood, is, that which is committed by Witnesses in their Depositions, which may be many ways committed: As 1. By taking Money to depone or not depone. *Si quis pecuniam ad dicendum vel non dicendum testimonium acciperit, l. 20. ff. h. t.* by concealing the Truth, or expressing more than the Truth, though they received no Money, *l. 16. §. ult. hoc tit.* 3. By deponing things expressly contradictory, but in this case the Contradiction must be palpable, and not consequential, *nam omnis interpretatio preferenda est ut dicta testium reconciliantur.* Witnesses either are such as were sworn, and if they swear falsely, *eo casu*, they are guilty of Perjury (*vid. tit. Perjury.*) or else they are such as are false Witnesses, without an Oath, as Witnesses in Papers, and these are punishable, *tanquam falsarii*, *Bart. ad l. si quis ff. ad l. Corn. Clar. hoc tit. num. 11.* And of these I design to treat only at least principally in this Title.

He who depones falsely in one Point, is reputed false in all his Deposition, whether the Points be co-herent or not; But he who depones falsely only in extrinseck Circumstances, is not to be equally punished, as if he had deponed falsely upon the Substantials of what is interrogat; and yet in both cases he is *falsarius*. And thus the Lords ordained one of *Barclays* Servants to be sent to the Cross with a Paper Hat, because he prevaricat only in his Deposition about the carrying of a Letter, though that was extrinseck to the Debate, and was mainly used to try the Witnesses honesty. Oblivion or Forgetfulness excuseth sometimes, *à pana ordinaria falsi*, if it be invincibly or strongly founded, but not otherwise.

Witnesses deponing falsely, and such as induced Witnesses, were by our Law punished according to the Disposition of the common Law, *Act 30. Parl. 6. J. 5.* but thereafter by piercing their tongues, and escheating of their moveables to the Kings use, and are never to brook honour, office, or dignity, and are to be further punished in their persons at the sight of the Lords, according to the quality of their fault, *2. M. Parl. 6. Cap. 48.* By the Lords in this Act, are meant the Lords of Session, who may punish witnesses *ex incontinenti*, during the dependence of the process before themselves, wherein the Witnesses depone falsely; but if either the falshood was committed by deponing in another Court, or if the Lords be *functi officio*, as to the Process wherein the falshood was committed, *eo casu* the Lords cannot Judge the falshood, or punish the false Witnesses. Sometimes the Lords ordain the Witnesses to be remitted to the Council; thus the Lords ordained the Witnesses, who had confessed that they subscribed Witnesses to a Disposition granted by the Tutor of

Towie to his Nephew, to be remitted to the Council, who banished them: And sometimes they themselves ordain them to be banished, or to have their tongues pierc'd, or to be set upon the Cock-stool, with a Paper-Hat, yet they cannot ordain them to die, because the arbitrary power granted by this Act, cannot in Law be extended *ad infligendam penam mortis*, as is fully cleared else-where, and therefore the Lords use to remit the falsarie to the Justices, if the Crime deserve death. But it may be questioned, if the Justices can inflict the pain of death in any case upon false Witnesses, since that Crime is not declared capital by any Act? But to this the answer is, that they may, and do inflict capital punishment upon the committers of this Crime, in some cases. And by the fore-said Act *Ja. 5.* it is declared punishable, according to the disposition of the Common Law, by which is meant the Civil Law, & *de practica*, Witnesses have been hanged for bearing false vvitnesse, as *Croy*, and for suborning others to bear false Witnes, as *Cheyn*, March 15. 1605. & *Grahame*, March 8. 1615. At vvhich time also *Dunlop* and some others vvere hanged for offering themselves to be false Witnesses, albeit they did not actually depone, because they vvere not received, the offer having before their examination come to light.

IX. The third kind of falshood is committed by falsifying money, *falsum nummarium*, vvhich is accounted so great a Crime, that it is commonly excepted out of Remissions, as may be seen in *Crighthouns* Remission, March 15. 1661. This Crime is committed, 1. By forging true money without authority. 2. By Coyning false mony, and impressing Copper, Lead, or any base Mettal, with the stamp of the Prince, or of other current money. 3. By mixing and alloying worser with nobler mettalls, in currant Coyns. 4. By venting and passing, or out-putting (as our Law Terms it) the adulterat money coyned by others, or intertaining the Forgers, or being art and part *redde*, or of the Council with the Coyners. By the Civil Law, *qui probos nummos cudunt sed non in officina publica, tenentur lege Cornelia nummaria*, l. 12. *C. de falsa moneta: qui adulterinos cudunt & qui veros adulerant, radunt, fingunt*, l. *quicunque* & l. *seque ff. hoc tit. qui nummos probos lavant, constant, aut vultu principum signatos reprobant*, l. 1. *C. de vet. numis: pot.*

By our Law, every Burgh should have a clipping-house, (which was a house for trying money, for the tryal was by clipping) and sworn men, who should clip evil money, who are to have a penny for ilk pound that is clipped, and the haver was to tyne the false money, *J. 6. p. 1. c. 19.* and the clipped money, if it be evil Stuff, or false coyn, should be returned to the owners, *J. 4. P. 4. Act. 4.* They who falsifies money, or counterfeits the Kings Irons, are to be justified (i. e. punished) according to the old Law, *Act 124. P. 7. J. 5.* By which Act; though it be added according to the old Law, yet we have no Law, *de falso nummario*, prior to this, except *Act 40. P. 5. J. 3.* which punisheth only the home-bringers of black money with death. By the *Act 70. P. 9. Q. M.* the home-bringers of false coyns, or lay-money, should be dilated, and the dilater is to have the half of all his goods, moveable and immoveable, for his revealing: And it seems by that Act, that it is made Treason, for confiscation of Lands or Moveable Goods, is only in the case of Treason; and I find no other Act that can be the foundation of *Drummonds* conviction as a Traitor, *Et de practica*, this Crime hath been diversly punished: *Reid* was hang'd for forging false money with the Kings Irons, July 13. 1602, *Drummond* burnt for forging false money, November 27. 1601. And his Brother *Patrick Drummond* burnt also for art and part, red counsell and concealing the treasonable forging, coyning, and out-putting (for venting is still a Crime, and is designed out-putting in our stiles) of false money. *Meinzie* also was hanged for art and part, as said is, June 30. 1603. *Thomson* was hang'd and forefault for bringing home and out-putting false money, January 19. 1603.

X. The



X. The fourth species of Falshood, is false weights and measures, *adulterina Statera*, which are punished per l. Corneliam, l. annonam, ff. de extraord. Crim. & falsa mensura, which are punished per relegationem, *ibid.* With us the using false measures or weights of old was punished by a Fine, *leg. Burg. cap. 52.* And the Baillies of the Burghs were declared Judges competent thereto for the first three faults, but the fourth was declared to be only punishable by the Justices, because the committers life was to be in the Kings will, *cap. 74. ibid.* But now such as use false measures or weights deceiving the people, are to be indicted as falsars, *Act. 47. P. 4. J. 4.* By which Act, havers cannot be punished, except they use, since the Act ordains users to be punished; and mentions only such as deceive the people, which is not done without using: And by the 2. *Act. Parl. 19. Ja. 6.* the users of false weights and measures are to tyne their hail goods and geir; which punishment derogats not from the former Act inflicting the punishment of falsit, as hath been debated more fully in the Title of Deforcement: *de practica*, I find that Brown was fyn'd for false measures by the councils warrand in 100. merks pen. July 1629. And that Porten was found guilty, though using was not proved, since having of false weights in the Shop presumes using, except this presumption be taken off, as by alledging that the weights were presently bought, or borrowed, or laid aside as light, May, 1671.

By the foresaid last Act, the Sheriffs, Lords of Regalities, and Stewarts, are declared Judges competent to this Crime, but their Commission there is only temporary for a year, and therefore it may be concluded that these are not otherways Judges competent to this Crime, else this commission had been unnecessary.

The using also a longer Ell or Yard is also punishable, though it would appear that here the Merchant himself is only prejudged, for he may receive as well as give out by it; nor doth the Law presume that a man would keep any measure to his own disadvantage.

I find also that there was a Merchant in Elgin pursued before the Justices, July ult. 1673. for false Weights, in swa far as he going to a Mercat, draggd his Tobacco after the Boat in the Salt Water, which made it weigh more than otherwise it would have done, and so the People were cheated: But the Dyet was deserted, and though the Defender alledged that this was done for keeping the Tobacco from drying to much, and mouldering into pieces, yet the Magistrats of Elgin had fyned him formerly for the same Fault in 20 pound Scots, even for the ill Example, *pana falsa arbitraria tenetur qui in sua mercatura addit inutile, ut pulverem, arenam, &c. aut species aridas detinet in loco humido, Carp. pag. 375.*

XI. Falshood is also committed by assuming a false Name. *vid. Stallionatum*, and by presenting one person for another at the subscribing of Papers, *suppositio falsa personæ*, which is punished *tanquam partum suppositum*, by the Civil Law. I find one David Donaldson hanged for this Imposture, having made use of a false person, who designed himself to be the person who should by the Agreement have subscribed the Assigination, Decemb. 12. 1611.

The supposing a false Birth, that is to say, the laying in one Child for another, is punishable as a false Deed, with the punishment of Falshood, since thereby men are cheated out of their Estates. l. ad Corn. de fals. the words whereof being, *periculum capitis subeat*, is found to extend to death, *Boer. decis. 82.* And the Mid-wife who brought in such a false Child, is punished by death, *Pegner. decis. 80.* But I find that Farin. relates, that *periculum capitis*, was in this case extended no further than scourging: But yet, since this was a great Cheat, and doth steal away an Estate from the righteous Heir, and adulterais the Off-spring, it ought to be punished as severely as Theft, especially since it

can be committed only by such as being trusted, aggrage their guilt by their unfaithfulness. This Crime is called by the *Latins*, *partus suppositus*, and by the *Bassticks*, *ἡ καταβολὴ τοῦ ἀλλοτρίου τοῦτο*.

## TITLE XXVIII.

### Stellionatus.

1 The several kinds of Stellionat by the Civil Law.

2 What it is, and how punishable by our Law.

**T**HE Heart of Man is deceitful above all things, and such as have been conversant in business and Courts of Justice, have found that Cheats do amongst men multiply, and vary themselves into so many Forms, that Legislators were forced to invent this general name of Stellionat; under which they might range all Cheats, and thence sprung that *Maxime*, *l. 3. ff. h. t. whicunque titulus criminis deficit illic Stellionatum objiciemus*: Which must be interpreted and restricted in its generality, by the preceding words, *Stellionatum objici posse his qui dolo quid fecerunt*: So that to infer this Crime, it is requisite that there be a Cheat or Fraud used, and that the Cheat want an other Name, for there, are Frauds which cannot be comprehended under this Title, as falsifying Writs, counterfeiting Seals. The ordinary species of Stellionat in the Civil Law, are to sell, or impignorat, or to give for payment fraudulently of our Debt, these things which belong to others, And to corrupt or change Merchandise, which we formerly sold: To exact likewise Debt which was formerly payed, and known to be payed, is Stellionat, *l. 29. ff. mandati*, but the craving of it is most Criminal, if Receipt of what is craved follow upon it. *Bartol. ibid.* And so far is receiving Criminal, that the receiving payment of a Debt formerly payed, is Stellionat, though simply craving without receiving will not infer it; but it is most observable, that Fraud is still requisite to the construction of this Crime, and its Essence.

II. By our Law we have no express Statute against Stellionat, except only Act 140. P. 20. J. 6. Which bears, that no Duty shall be disposed to two sundry persons, which is *crimen Stellionatus* of the Law; from which Act it is to be observed, that our Law presupposes the Civil Law to be our Law, as to that Crime; for it does not determine what is to be accounted Stellionat, or appoint a particular punishment for Stellionat, but only clears declaratory, that the disposing Duties or Rents of Lands to several Persons, shall be accounted *Stellionatus*; And therefore what ever was punished as Stellionat by the Civil Law, may be punished as such by ours; not only *à pari*, or by extension, but by approbation; the *Roman Law* having by the allowance of that Act become ours; and therefore the making of double assignments or dispositions of Lands, or of any thing else besides Rents mentioned expressly in that Act, is punished as Stellionat in our practice, which is warranted likewise by the 105. Act P. 7. J. 5.

By which Act, though Stellionat be not mentionod, yet it is thereby punished, for it is there declared, that whosoever makes double Dispositions of Lands, he shall be called at the Kings instance and punishd at the Kings will.

But

But it may be doubted, why double alienations should be punished as Stellionat, seing *qui rem unam duobus vendit falsi est reus l. qui duobus, ff. ad l. Corn. de falso*. In answer to which, I conceive, we must distinguish betwixt these who whilst they are selling, being desired to clear, if the thing offered to be sold, hath been formerly sold, or not: say that it was not. In which case he is guilty of a manifest lye and so of Falshood; But if he only sell one thing twice, without denying that it was formerly sold, or was not his own, then he is only guilty of Stellionat, seing though there be a cheat in this case, yet there is no lye; An instance vvhereof fell out in my ovvn experience, for there being tvvo Writers to the Signet of one name, & money being directed, to one of the tvvo, the bearer delivered it to the other; as due by his Master to him, vvvhich case vvvas thought by those vvho consulted it, to be Stellionat, seing though the receiver had not said to the bearer that his Master vvvas his debtor, yet he should not have received the money, for he vvvas oblidge to knowv that the same vvvas not due to him; And yet according to *Farinacius* opinion ( who thinks that *dolus in committendo tantum infert stellionatum, sed non dolus in omittendo* ) It might be debated that this case vvvas not Stellionat, seing the receiver of the Money vvvas only guilty of omission, in not clearing the bearers mistake: But I differ in this from *Farinacius*, For seing *Dolus in omittendo*, may be a great cheat in it self, and that the party vvronged is as much lesed thereby, I knowv no reason vvhy the one may not infer stellionat as vvell as the other: And albeit *dolus in omittendo*, vvvere not Stellionat, yet this case vvvas, seing the receipt of money sent to another is more than omission.

By that Act *James 5*. It is likewise declared, that Superiors receiveing double Resignations, shall be punished as these who grant double Dispositions: And certainly that part of the Act was most just, seing if the Superior was conscious to the design of making these double Resignations, he cannot but be art and part of the cheat of making the double Dispositions, vvwhereupon the Resignation flowved; and so should be equally punished; and in effect, a Superior granting nev Infeifments, upon divers Resignations, to divers persons, does grant double Rights: for to grant a nev Right upon the old Vassals Resignation, is to dispone. And seing the buyer is prejudged more by these Resignations, than by these Dispositions, upon vvvhich they flowved, ( that being a more compleat Act than the other ) it vvvere unreasonable that the Superior should not be punished as vvell as the seller; and yet because it is not presumed, that any vvould cheat vvhere there is no gain, and that the Superior in receiving resignations, *in favorem*, gains little, therefore this part of the Act is nowv in *desuetude*.

I find likewise, that other species of Stellionat are punished by our Law, as in *Anno 1634*. *James Clerk* vvvas putted, because a Svword being sent by *Cuthbertson* to *Moubray* a Svword-slipper, *Clark* did say to the bearer that he vvvas *Moubray*, and so took the Svword, vvvhich Libel the Justices vvould not sustain to infer falshood, bnt *tanquam crimen in suo genere*; and yet *L. 13. ff. ad l. Corn. de falso; Assumptio falsi cognominis est crimen falsi*.

The punishment then of this crime could not be certain and determinat, seing the Crime is various in its ovvn nature, but it is arbitrary and punishable at the discretion of the Judge, according to the circumstances and measures of the fraud committed. And it is called Stellionat, from a Serpent called *Stellio*, vvvhich is beautified by Starry spots, *stellatis guttis distinctum*, and is the most subtle of all Serpents, *pluv. lib. 30. nat. histor. cap. 10*.



## TITLE XXIX.

## Perjury.

- 1 What is Perjury, and the several kinds thereof.
- 2 Whether he who swears only that he believes what he depones to be true, be punishable for Perjury.
- 3 Whether he who promises upon Oath, and performs not, be punishable for Perjury.
- 4 Whether these who perform not their Parents Oaths, are punishable for Perjury.
- 5 Whether Witnesses who depone falsely, can be convicted of Perjury, upon the Depositions of other Witnesses.
- 6 Whether a Judge or Advocat violating his Oath, *de fideli*, be punishable for Perjury.
- 7 The punishment of Perjury by the Civil Law, and ours.

**S**ince Witnesses can by their Depositions, take away the Lives, or ruine the Estates, of such as are the greatest men, or have the greatest Fortunes; the Law which reposed that Trust in them, doth very justly over-awe them, in deposing by the reverend fear of an Oath, and by threatening them with the severe punishment of Perjury, if they swear falsely.

I. Perjury is defined by Lawyers, to be a Lie, affirmed judicially upon Oath; But because it is not presumable, that any person would both be so mean as to lie, and so wicked as to call G O D to be a Witness thereto: Therefore Lawyers have very justly delivered us a Brocard, that Perjury is not committed without Fraud, *Interpretatio faciendo est ut evitetur perjurium*; and from this Principle they have deduced, that 1. he who swears that which is false, believing it to be true, is not to be punished as a Perjurer; for in effect he doth not then lie, add *ad clar. num. 13.* 2. If the Perjury could have prejudged no man, *Clar. num. 11.* because it is not to be presumed, that a person would perjure himself, while he could have no design: And from this may be likewise inferred, as a Consequence that Perjury should be hardly fastned upon any person, for matters of very small consequence, seeing as *de minimis non curat prætor*, so it is not presumable that a man, especially of any integrity or Honour, would incur that guilt, and this was alledged, for Mr. James Row a Minister, when he was pursued for perjuring himself, by Sir Thomas Stuart, in anno 1667. for the matter of five pound Scots; but this Point was not decided. And albeit I think where this is joyned with other Circumstances, which may render the Decision dubious, the Council may either mitigate or remit the punishment; yet if the perjury be clearly proved, I think it should be punished: and in no case should the Justices refuse to put the Pannel to the knowledge of an Assize, because the matter wherein the Perjury is alledged to have been committed, is very small: but it is punishable, if at first it might, though thereafter, *ex eventu*, it proved not prejudicial, as if the Writ was improven by a Certification; yet the false Witnesses are thereafter punishable, though at the time of the Inquiry, that Paper could prejudge no man, because of the Certification. It was found in Barclay's case, February 1670. 3. Where the matter is difficult, it is presumed that the Swearer

er did not understand then that he did perjure himself. *Clar. num. 10.* but if the Swearer did not take pains to understand the matter upon which he was deponing, I think the Difficulty should hardly excuse him.

II. 4. It is controverted among the Doctors, if he who swears *per verbum credo, I believe*, can be punished for Perjury. And in Mr. *Ja. Row's* case, it was alledged, that it should, because in effect all Oaths are but Oaths of Credulity, where the matter falls not under sense; and in this case where it was referred to his own Oath, if he was payed of his Stipend, and he depone upon Oath, he believed he was not payed, *hoc casu*, the Word *Believe*, should have inferred Perjury, because he should not have believed except he had certainly known, and Belief presupposes a Certainty, for Faith and Belief are all one, so that in effect, to depone he believed it was not payed, was to depone, it was certainly not payed, or that in Faith it was not payed, either of which would have inferred Perjury. But 2. *Perjurium est affirmare quod dubitas arg. L. vinc. ff. nihil nov. apel. & indiscrete jurare est instar perjurii. Gregor. Tholosan. h. t.* And if the adjecting such a dubious word as this, were sufficient to evite Perjury; that Crime should never be incurred, and certainly it is in it self a great undervaluing of the Deity, (*quod est medium inducium hujus criminis*) to depone without Information, where Information may be had; & it is very presumable he would little value Perjury, who did value little to get such Information, as was requisite for satisfying the Judge, in clearing what was just: And seing the Law designs by punishing Perjury, to come to the exact knowledge of all privat cases, wherein Judgement is to be given, to the end *Judex* may *unicuique suum tribuere*, it follows necessarily, that it should very severely punish such as depone without previous Information, especially where the matter of the Deposition is *in facto proprio*, as in this case, for by this rash, or affectate omission, both the Law and the Judge are equally disappointed of their ends, as much as if the Deponer had willingly perjured himself. 3. A witnesse deponing falsely, *per verbum Credo*, is in Law punished with the punishment of falshood. *Bald. Salicet in l. de tut. C. de integrum restitut. Alexander Cœcis. 28. vel 6. Angel. consil. 4.* The deponing *per verbum Credo*, would have gained the deponer the cause; And asshoilzed him from the pursuite; And therefore it should infer Perjury against him, because the reason why Perjury is punished, is that there may be something to over-aw such to whom the verity of any cause is referred.

III. 5. It is doubted amongst the Doctors, if he who promises upon Oath in a Bond, to pay a Sum, or perform a Deed betwixt and a day, be guilty of Perjury if he failzie, and *Math. de asitizis*, relates a *Neopolitan* Decision, wherein it was found, that Perjury could not be inferred upon the breach of such an Oath as this, the words of the Obligation being to pay, *sub fide dal Gentilhommo*, because says he, this is *fides* and consequently cannot be punished, but only *pena extraordinaria*, though *Bertrand* be of another opinion, *Consil. 126.*

But the Question remains yet intire notwithstanding of that Decision, whether they who promise under an express, formal, and religious Oath, as that by God himself, or Holy Trinity, they shall pay a Sum, or do such a Deed, betwixt and a prefixed day, may not be pursued for Perjury: and that they should not, may be argued from this, that these being extrajudicial Oaths, the Law should not encourage the giving, or exacting of them, so as to punish the not Implement of them with Perjury; for this would make every man exact an Oath of his Debitor when he lent him Money, or upon every slight occasion, which were most inconvenient. 2. The Laws doe not punish extrajudicial Oaths, given in Depositions of Witnesses, & *sic testis deponens in judicio contrarium ejus quod dixit extra judicium, non punitur de falso: Alex-*

ander lib. 1. Confil. 74. Covar. in repit cap. quantis de puit vid. Monoch de arbitrar. Caf. 312. Much lefs ſhould it ſuch extrajudicial Promiſes: Yet ſome think even ſuch Contraverſions as theſe, ſhould, *ob defectum numen*, be puniſhed arbitrary, but if this Promiſe be given judicially, as in *cautione juratoria*, in Removings, whereby the Party obliges himſelf to remove, and pay the violent Profits, or whereby he binds himſelf to report the Criminal Letters to the Juſtice-Clerk, in theſe and ſuch other caſes, I think the not Implement of the Promiſe, unleſs a reaſonable Cauſe can be assigned, ſhould infer Perjury, both becauſe this is a judicial Oath, and becauſe in Contemplation thereof, the Law remits the neceſſity of finding another Cautioner, and the Party concerned has no other Security than what is founded upon this juratory Caution.

IV. 6. It is doubted among the Doctors, whether theſe can be accompted perjured, *qui non impleverunt vota parentum juramento confirmata*, who perform and fulfil not their Parents Oaths. In which caſe *Grotius* diſtinguiſhes betwixt thoſe Oathes, whereby the Father bound himſelf only to God, and in theſe the Son for not implement, is not guilty of Perjury, becauſe in effect, *illud non eſt onus hereditatis*, but is perſonal; and ſo the Son repreſents not the Father in it, but if the vow were made to a particular perſon, then that vow being *onus hereditatis*, the not implement of the Fathers vow, will infer Perjury, for *quoad* the eſtate *heres & defunctus ſunt una & eadem perſona*. *Mathews* diſtinguiſhes in this caſe, *ſi juramentum parentis ſit in rem conceptum, & eo caſu tenetur ſed ſi non ſit in rem conceptum ſed in perſona, non tenetur, arg. l. 7. 8. part. ff. de part.* It may be likewise doubted upon the ſame ground, whether the oath of any people in publick affairs, relating to the ſtate, doth tie their children, & the example of *Sauls* being puniſhed for not obſerving the Oath whereby the people of *Iſrael* were tyed to the *Gibeonites* 2. *Sam. 21*. ſeems to evince, that the contravention of theſe National Oaths given by Parents, is puniſhable upon children, *in foro divino*, but whether the Civil puniſhment can be inflicted for contravention of National Oaths, ſuch as the Covenant, and Declaration, either in the caſe where the Oath is given, either by the predeceſſor, or the giver himſelf, is not decided. And I ſhould incline to think, that the contravention of theſe National Oathes, cannot infer the Civil puniſhment of Perjury, both becauſe the deſign of Perjury is only to puniſh ſuch as do prejudice the privat intereſt of theſe, concerning whom they ſwear, and ſuch a contravention cannot be properly called *mendacium*, the Swearer having deſigned at that time to fulfil what he Swore, though he thereafter alter his judgment: Nor can *dolus* be alledged in this caſe, nor that the intereſt of a third party is thereby prejudged, all which are requiſite for inferring Perjury.

V. 7. When witneſſes depone with us in any privat caſe, it was of old doubted, whether the Depoſitions might be reprobated, and themſelves puniſhed for Perjury, by the Depoſitions of other witneſſes, and of late theſe concluſions ſeem to be regularly allowed. 1. That a witneſs deponing *verba initialia* falſly, ſuch, as of what age he is, whether he be married, or where he dwells, *eo caſu*, he may be puniſhed for Perjury, if he depone falſly, for theſe queſtions are propoſed, not only to the end it may be known what age the witneſſes are of, but likewise to the end it may be known whether the Deponer be a perſon of ſuch veracity, as may be truſted, and that by theſe, his veracity may be traced and examined. 2. That a witneſs may be convinced of Perjury by writ. But 3. whether a witneſs may be convinced of Falſhood and Perjury, by the Depoſition of other witneſſes, was contraverted in the caſe of *Balkanquel* againſt *Rig* a Miniſter, and that he could not, it was urged, becauſe if this were allowed, *daretur progreſſus in infinitum*, for elſe if two wit-



vvitneses deponing that such a thing vvere done, might be convinced of Perjury, by other two or more vvitneses, these vvitneses might again be convict by others, and those by other, *in infinitum*, for the other part, it vvas alledged, that 1. There being nothing to overavv vvitneses in Scotland but the fear and hazard of Perjury to free vvitneses from this tryal, vvas in effect to render them *Libertines*, and to incourage them to depone falsly. 2. It vvas absurd to think, that if two vvitneses should depone that vvvhich vvere notourly false, as that such a man vvas killed, vvho thereafter vvas seen by a vvhole Judicatory, and all the members of Session and Parliament, to have been alive, that *eo casu*, vvitneses should not be found guilty of Perjury. 3. Assizers who are in effect Witneses, as well as Judges, and may proceed to a Sentence upon their own privat knowledge, may be tryed by an Assize of Error, consisting of twice as many; Whereas, if the Depositions of vvitneses could not be reprobated by other vvitneses, no Assize could be convict by an Assize of Error, as *temere jurantes super assiza*. To the foresaid argument it is answered, that 1. The same did only evince that the probation should be more exact in that than in other cases, but did not all conclude, that such vvitneses could no wise be convinced of Perjury; and the ordinary rule given by Lawyers, is, that twice as many are requisite to reprobate, as to prove: Which conclusion could not take place, if the reprobation of vvitneses by vvitneses were not sustained. 2. This argument would evince, if it had any weight, that even, *circa initialia*, vvitneses perjuring themselves could not be pursued for Perjury, because these may be convinced by other vvitneses, and these by others, & sic daretur progressus in infinitum, so that either vvitneses cannot be convict of Perjury in no case, or else they may be in every case, where they swear falsly: Notwithstanding all which the Justices by Interloquitor found, that vvitneses could not be pursued for Perjury, upon the Deposition of other Witreses upon the day of 1677. but yet it remains doubtful, whether one vvitness may not be pursued for Perjury, upon the deposition of others, though two cannot, because the joynt depositions only make a full probation. 8. *Clarus, num. 12. §. perjurium*, is of opinion, that when any thing is referred to Oath judicially, that *eo casu*, the party vvho swears, can never be challenged for Perjury, *J. d. Solum deum habet ultorem*; which Boerius doth also assert to be the common opinion, *decis. 305*. And the reason which moves them to this, seems to be, that a Party having made his Anragonist absolutely Judge of his own cause, he has, as it were, submitted to him, & *juramentum debet esse ultimum refugium*, and this seems to be the case decided, *per l. 2. C. de rebus credit: religionem contemptam juramenti satis deum habet ultorem sed majestatis crimen vel periculum corporis & si per principis venerationem quodam calore fuerit pergeratum; inferri non placet*, for in the immediately preceeding Law, it is said, that *causa jure jurando ex consensu utriusque partis delato decisa, nec perjurii prae-textu retractari potest*, so that adding both Laws together, the sense is, that when the cause is referred to any parties Oath, it being decided conform thereto, that Decision can neither be retracted upon pretext of Perjury, nor can the Perjurer be corporally punished. And this seems a much more reasonable answer, than these many given by the Doctors; but yet I cannot assent to the conclusion it self: nor is it at all conform to our Law, nor perhaps to reason; for interest and avarice are sufficient baits to Perjury, though impunity be not thereto added. and when the party defers an Oath, he intends thereby to submit finally to him, to whom the samin is deferred; but not so, but that if thereafter the swearer shall be found Perjured, he may be still challenged: Nor perhaps would have deferred the Oath, if he had not concluded himself secure, as to what should be deponed, not only out of respect to religion, but likewise because of the hazard of Perjury; and seeing in this case, there is *Mendacium juramento affirmatum*. I do not see how it should

should not be Perjury: Is there any ground, why at least His Majesties Advocat should not be allowed to pursue it, for the reason which is urged for the Speciality in it, ceaseth in him. And as there is no Decision in favours of *Clarus* his opinion in our Law, so in Mr. *Ja. Row's*, and other Cases, where this might have been proponed, this Defence was never proponed; yet in some cases, the Deponer *in juramento delato*, craves that the Lords may declare, that he shall not be lyable for Perjury, when any Oath is necessarily so deferred to him, which the Lords in some cases use to grant, as *in facto antiquo*: And by so doing, they show that Perjury is punishable, *regulariter*, even in him to whom an Oath is deferred: but I believe, that the Doctors have more justly concluded, that where an Oath is deferred in Criminals, though the Pannel needs not swear, yet if he do swear, he is not punishable as a perjured person, though he swear falsely, *quia licet cuiq; suum redimere sanguinem*, *Clar. num. 12.* And yet it may be debated, that this holds not with us in Usury, and other cases, because there the Law obliged him to give his Oath; and *Mathews* doth think, that it should in no case, but rather that the Perjurer should there be punished with a double punishment, both for concealing the Crime, and also Perjuring himself. And it may be alledged that this is rather punishable than ordinary Perjury, because the Defender needed not swear, and was in no hazard by not swearing, and the less the temptation be, the sin is always the greater; Nor needed the Defender redeem his own Blood by swearing, as is pretended, or at least, *licet hoc liceat, licere tam debet per modum licitum, sed non perjurio.*

VI. It may likewise be doubted in some cases, whether the violation of an Oath doth infer Perjury, as when a Judge gives his Oath that he shall administer Justice impartially, or an Advocat that he shall be honest in his employment, without discovering his Clients secret, or betraying his Business; If that Judge, taking Money as a bribe, or that Advocat thereafter prevaricating, may be upon these accounts pursued for Perjury. And this was, I remember, controverted in the case of one of his Majesties Officers of State, who was pursued upon the foresaid Act of Queen *Mary*, for Perjury; because he was alledged to have taken Money from the Defenders, in case wherein they were pursued at His Majesties instance; And that this could not infer Perjury, was argued from this, that our Law having made some particular Statutes, as to Perjury, it designed thereby, that the Subjects of this Nation, should not in this Crime be left to the common Law; And that seeing it had only punished Perjury in the case of Witnesses, Assizers, and Bigamy; it did clearly follow, that Perjury *Deum tantum habet ultorem*, in all other cases. 2. If Perjury were punishable in this case, Tutors and Executors who find Caution, might be always punished for Perjury, where they are pursuable for Mal-administration, which were absurd, and was never practised in any Nation. 3. When such Oaths as these are given, these Words, *As ye shall answer to God*, are ordinarily adjoined, rather to impress a fear of the Deity upon the swearer, than to Subject him by the Oath to the hazard of Perjury: and the fear of Perjury is neither thought upon, nor considered by the Administrator, nor the swearer, so that *non de hoc agitur*, at that time, which is one of the many things, that is always looked to in punishing of Crimes. 4. If consequential Perjury had been punishable as formal Perjury, there needed no Act to have been made, declaring that Bigamy should be reputed, and punished as Perjury, seeing it was such by consequence before that Act. For the better clearing of this case, it will be fit to divide Perjury in Formal and Consequential Perjury: and to conclude that formal Perjury, which is in these cases declared Perjury by an express Act, should be punishable as a Crime; But that consequential Perjury,

Perjury, as may be instanced in the cases above written, should not be punished as a Crime, but as an Aggravation : For seeing in these the Perjurer did not formally design to commit Perjury, it were not very rational to think, that he should be punished by the formal punishment of that Crime : which distinction, I find likewise allowed by the Civilians ; for albeit formal Perjury was only punishable by Banishment, and Infamy : Yet if any man died by that Perjury, as in false-witnessing in capital Crimes, the Perjury was *eo casu* punishable by death ; And if it was mixt with Treason, it was punishable as Treason.

Margaret Wood was in February 1631. pursued, for having perjured herself as a false Witness, in so far as she having been cited before the Privy Council, and examined by them, she had deposed many false things against the Laird of Pitcaple, and Richard Mowat : Against which pursuit, it was alledged for her. 1. That she could not be pursued as a false Witness, because a Woman in our Law cannot be a Witness, and consequently she cannot be a false Witness. 2. She did not depone upon Oath before the Council, and consequently she cannot be guilty of Perjury, since *nemo sine juramento est perjuri reus* ; Nor is a person deposing for the information of the Council, obliged before an Oath be administered, to consider what she is deposing as lyable to the certification of Perjury, and if it were otherwise, there needed no Oath be administered ; so that before the administration of an Oath, the Deponer being neither a Witness, nor sworn, can neither be guilty of Perjury, nor false Witnessing : Much less can she be guilty of Perjury, in having deposed falsely, which is a complicated Crime, made up of Perjury and Falshood. 3. she is but one single witness, and so could not have prejudged by her testimony, the persons against whom she deposed, & *semper perpendendum est damnum, quod ex perjurio resultat*, *Carpz. quest. 46. n. 47.* Likeas, here she retracted her own Deposition her self, before any pursuit was, or could be intended against those Gentlemen : And that she Deponed was the result of the confusion she was put in, by her appearance before the Council, being a young Girle, not exceeding 18. so that her age and sex should excuse her, *si quis calore iracundia, aut forte lingua lapsus, aut precipitatus, perjuriam commisit, ei eo casu ignosci debet*, *Rens. lib. 3. decis. 2.* And there is nothing more natural, or less dangerous, than that a guilt arising from a deposition, and meer words should be taken off in the same way, especially, before any person be thereby prejudg'd, as in this case. 4. This Libel could not be warrantably founded upon the Act of 2. M. which punish'd only perjury committed in marrying two wives, but no other species of perjury. To which it was answered, that as to the first defence, it was not relevant, since she being cited before the Council, ought to have depon'd truly, even for informing the Suprem Judicatory of the Nation, who use, and must examine women for the good of the Common-wealth : especially in such atrocious and occult Crimes, as in the burning of the House of *Frendraught*. And though the Defender may in some cases cast a woman from being a witness, yet that excuses her not if she be examined. To the 2. Lawyers are clear, that a witness may Depone without being sworn, for the swearing them is not essential, since the Pursuer may remit it : And yet the witness who depones falsely, even though not sworn, is a false witness, *Bart. in l. si quis ff. ad l. Cornel. de fals. Clar. h.t. num. 11.* To the 3. it was not relevant, since she inform'd against these Gentlemen in a treasonable Point, and might have prejudged them : Nor did her Retraction proceed from Repentance, but Confrontation ; nor did she accidentally only, or by Confusion lapse into this Error, she having spread these Mis-reports before she was cited, and having reiterated her Confession after Citation. To the 4. the Practice of the



Kingdom was opposed, which is the best Interpreter of the Laws. And in anno 1615. *Graham of Long-boddum*, and in anno 1622. *Turnbul of Belfries*, and lately *Dempster of Muresk*, were punished with death for deponing falsely, or seducing others to depone. But these points were not decided.

VII. The punishment of Perjury by the Civil Law, was Banishment. *l. ult. ff. de crimine Stellationis*. And *fustigatio*, or Scourging, *l. si duo §. si quis perjuraverit*. By our Law, *A. 19. Par. 3. 2. Mary*, Bigamy is declared punishable as Perjury, which is declared to be Confiscation of all their Moveable-Goods, warding of their Person for year and day, and longer during the Kings Will, and that as infamous persons they shall never be able to bruike Office, Honour, Dignity, nor Benefice in time-coming. As to which Act, it is observable. 1. That Perjury is not formally punishable with us, but only declaratorly; Perjury being in it self so hainous a Crime; but the reason of this seems to be, that Perjury was before this Act punishable, after this manner, for by the 4. *cap. lib. 1. Reg. Maj.* it was appointed, that *temere jurantes super assisa spoliabuntur mobilibus & in carcerem detrudentur per annum & diem ad minus & infamia notam incurrant & amittent legem terra*, which *Sheen* interprets to be, *non habere personam standi in judicio*, and not to be receivable as Witnesses, either in *judicio*, or *extra judicium*, which Act is likewise ratified, by the 47. *A. 6. K. 7. 3.* Where it is said, that wilful or ignorant Affizers, Man-swearing shall be punished after the Kings old Law, in the first Book of the Majesty.

Where Perjury is to be inferred from a Deposition, either as Party or Witness, it is necessar, that the Deposition be subscribed by him; and the Lords found, that *Mr. James Row* could not be convict of Perjury, upon his Deposition subscribed by the Clerk.

Sometimes the Council change the punishment of Perjury into Banishment; as in the case of *Galbraith*, who came in will for Perjury. 23. July. 1625.

## TITLE XXX

### Of Injuries, Personal, and Real; and of infamous Libels.

- 1 *Injuries are either Verbal or Real.*
- 2 *The Requisites in Libelling verbal Injuries.*
- 3 *What are real Injuries.*
- 4 *Who are Judges to verbal or real Injuries.*
- 5 *Infamous Libels, how punished.*
- 6 *Leasing-makers, how punished by our Law.*

I Have oft-times thought that men should walk legally, not only in obedience, but gratitude to Law, since the Law takes so much pains to secure not only our Lives and Estates, but even our Honour and Reputation, and will humour us so far, as that because we will think Railery a Misfortune, it will therefore punish even these who offend our Imagination.

I. Injurie then, in its more comprehensive sense, may give a name to all Crimes; for all crimes are Injuries, but Injury as it is the Subject of this Title, is the same

same thing with contumely or reproach : It is divided by Lawyers, into such as are committed by thoughts, deeds, words, and gestures ; but the more received division is, that injuries are either verbal, or real.

II. Verbal injuries are these which are committed by unwarrantable expressions, as to call a man a cheat, or a woman a whore ; but because expressions vary according to the intention of the speaker, therefore except the words can allow of no good sense, as Whore, or Thief, or that there ly strong presumptions against the speaker, the *injuriandi animus*, the design of injuring, as well as the injuring words, must be proved, and the speaker will be allowed to purge his guilt, by declaring his intention, *l. 5. §. octavo, ff. de injur.* and his Declaration will, without an Oath, be sufficient, except the offender be burdened with contrary Presumptions, *Berlick: conclus. 60. num. 18.* Lawyers therefore require in Libelling injuries. 1. That the particular expressions be distinctly condescended upon ; nor is the general, you called me a Cheat or said some such thing, sufficient, being not only words but even the pointing of them does alter the estimat of Injuries. 2. The pursuer should Libel the design of injuring, except the words infer so clearly an Injury, that there is no necessity to Libel the design. 3. That the pursuer who was injured, did presently resent the Injury, and took what was spoke for an Injury, which the Lawyers call *revocatio injuria ad animum*. And it is sufficient, that this dissatisfaction being signified either openly and expressly, or by some other Acts which testified discontent, *ex incontinenti quis injuriam debet ad animum revocare, aliàs ex intervallo nihil facit, sed injuria remissa censetur. §. ult. just. de injur.* And the reason of this seems to be, because the essence of a verbal injury consists in dissatisfying the person to whom the words were spoken, and words are only Injuries, if they be so taken, and therefore if they were taken at first to be no injury, they were then no Injury : And if they were not then an injury, they could not afterwards become such.

Since then Injuries are estimat according to the design of the offender, it follows naturally, that men who are Fools, Idiots, very young or very drunk, are not punishable for verbal Injuries, except the offender did become drunk upon design to offend, *si non ex proposito sed ex impetu deliquit*, And great passions which break off all designing, *justa et non affectata ira* excuses also in this case. As also for the same reason, the objecting true Crimes are no injury, if the objecter designed principally not to offend the person guilty, but to inform the Common-wealth, or to defend the speakers own honour. And upon the first accompt, it was found, that the detecting what the Commonwealth was not much concerned in, was an Injury, *Cravet. consil. 145.* And upon the last accompt, it is thought, that to give a man the lye, is an Injury; but that it is no Injury to say you speak not truth ; for in the one we defend our own honour, but in the other we offend the honour of the speaker : And custom has made the expression pass for an expression to be used when we design to offend. The relating likewise what we heard from good Authors, who designed no prejudice, is sufficient also to defend against the punishment due to Injurers, as was found in the Court of Savoy *Cod. fab. de injur. def. 5.* Yet sometimes Injuries are inferred not only from exprels words, but even from the presumptive meaning of the speakers ; As to look in a mans face, and to say, I am not a lyar as others are, *Afflic. §. injuria. tit. de perjur. firm.* or to say, flauntingly, you are a fine Church-man. *Jacob. de bello visu lib. 1. cap. 3 num. 31.*

III. Real Injuries are committed, by hindering a man to use what is his own by removing his Seat out of its place in the Church, by giving a man medications which may affront him, by Arresting his Goods unjustly; by wearing in contempt what belongs to another man as a mark of honour ; by Razing sham-

fully a mans Hair, or Beard, by offering to strike him in publick, or by striking him, or riving or abusing his Cloaths, or his House, and many otherways related by *Berlich. conclus. 69.*

IV. According to our Law, verbal Injuries are punished only by the Commissars, who are *judices Christianitatis*: Scandal being a Church Censure, And the Commissars do inflict pecuniary mulcts, and make the offender do penance at Church Doors, or otherwise: Nor do ordinarily the Lords of Session either Advocat such Actions, or modify their penalties.

The Council do use to remit to the Commissars such Pursuits, and refuse to try verbal Injuries done to privat persons, as in the case of *Strauchan* and *Straiton*; But if the verbal Injury was done to a Magistrat, as if any man should call him a Knave, or a Fool, then the Council use to fine and to punish even verbal Injuries, as in the case of *George Campbell*, and the Bailiffs of *Inverary* 1666. Or to a Privy Counsellour, as in the case of *Mr. Alexander Spotswood*, and the Justice Clerk. And though verbal Injuries are extinguished by the Civil Law if they be not pursued within a Year; or by posterior friendship: for the Law is most desirous to pais by such imaginary Crimes, yet in *George Campbells* case, a subsequent reconciliation was not sustained as a relevant Exception, because it was not very expreis; They punish also *scandalum magnatum*.

The Criminal Court likewise punish verbal Injuries, if against Magistrats, but will not sustain a pursuit against privat persons, for though 11. of *Novem. 1662. Aikman* against *Carnagy*; nor would they sustain a Criminal pursuit, for calling a Minister perjured, *vid. Stock. decis. 108.* where he tells us that it is the present Custom of *Brabant* not to sustain Criminal Actions for words, except they be spoken against Magistrats in the exercise of their imployment *vid. l. ult. ff. de priv. delict.*

Real Injuries may be pursued before the Council, or Justice Court, and the punishment is arbitrary.

V. Infamous Libels, *libelli famosi*, are the most permanent of all Injuries, and therefore are most severely punished; And in it the offender, shews more design, and therefore is more guilty.

He who writes, dictates, or affixes infamous Libels, or causes write, dictate, or affix them, is punishable.

He who finds an infamous Libel, and shews it though to one only, is punishable, if malice or design can be proved, else not: For there is nothing more ordinary, nor more innocently done for the most part, than to shew such Libels: whether *dolus malus & animus injuriandi*, (a design to offend,) be presumed in this delict, or must be proved is much contraverted. *Bertaz. consil. 237.* affirms that it is presumed. *Farin. quest. 295.* affirms it is not presumed, but must be proved. And I incline to this last opinion, seing infamous Libels are not now so much resented as formerly, custom having much allayed the picque which used to ensue thereupon, and that custom defends from all guilt in this case, is most learnedly maintained by *Coler. decis. 154.* where it was found that Stationers were absolved, though they sold infamous Libels, because all Stationers use to sell such.

Many things do likewise in this case lessen the punishment, as that the Pannel is a minor, was provoked, did tear it before it was fully written, or after it was affix; Or confest his fault, and said he did it only out of passion, or curiosity; or if what was said was true, *Berlich. conclus. 67.*

The punishment of this delict was of old arbitrary, *Paul. lib. 5. sent. tit. 14.* but was made capital by the edict, *Valentiniani & Valentis l. unic. C. de famos. libel.* but *Clar.* makes it arbitrary by the present custom of *Europ*: And so it is with us at present in *Scotland*, except where the Prince is abused; or where a capital Crime is alledged against any man, *foreo casu*, infamous Libels are justly



ly punished by death. And thus *Fleeming* was hanged for saying that he wisht that the King would shicot to dead and dye of the falling sicknesse, 17. May. 1615. but in this the words were maliciously spoken, for the speaker uttered them because he had lost a Flea. But sometimes the speaker is only Scourged and Banished, as *Tweedy* was, 13. March 1612. for abusing Constables and bidding the King, the Council, and them, kiss his arse, and swearing he cared not a fart for them, which words appeared both by the speaker, and the contexture of the words, to have rather flowed from folly, than design. And *Spotswood* in his History, relates, that the School-master of *Edinburgh* was hanged for dispersing Libels against the Regent, wherein he charged him with being guilty of capital Crimes.

*Leasing-makers.*

VI. Like to this Crime, if not the same with it, is Leasing-making, whereby Hatred and Discord may be raised betwixt the King and his People, which was punished with tinsel of Life and Goods, by the 43. *Act. Parl. 2. Ja. 1.* Likeas any Mis-representation (or evil Information, as our Laws call it) of the King to his People, is punishable in the same way, by the 83. *Act. Parl. 6. Ja. 5.* And though the slandering of his Majesty might have been punished, by reason of the first Act, yet we see that our Predecessors did not think *paritas rationis* sufficient in punishing Crimes; Upon which Acts a great person was found guilty of death, for writing a Letter, wherein the Parliament was slandered, 1662. But this was thereafter rescinded by his Majesty. Likeas by the 20. *Act* of the 14. *Parl. K. J. 6.* The hearing and not Revealing, and not apprehending of such Leasing-makers, if it be in the Hearers power, is equally punished with the Leasing-making; But because these Acts could not reach to slanderers of his Majesty to his people in *England*, or mis-representing them to the King, or abusing any Privy Counsellor of that Kingdom, therefore the misrepresenting them is declared punishable at his Majesties pleasure, by the 9. *Act. 20. Parl. K. Ja. 6.* By the same last Act, dispersing or making Cockalands, or other infamous Libels against Counsellours of *England*, is punished as Leasing-making.

## TITLE XXXI.

### Poynding of Oxen in time of Labouring.

- 1 How this Crime is punishable by our Law.
- 2 How by the Civil Law.
- 3 The Explication of our Act of Parliament in this case.
- 4 How the Civil Law and ours differs in this Point.

**B**Y the 98. *Act. Parl. 6. Ja. 4.* it is statute, that no Sheriff, or Officer, shall poynd, or destreinzie the Oxen, Horse, or other Goods, pertaining to the Plough, and that labours the Ground, the time of the labouring of the same, where any other Goods, or Lands are to be apprysed, or poynded, according to the common Law.

II. The Common Law, to which this relates, is l. 8. *C. quæ res pig. oblig. possunt, pignorum gratia aliquid quod ad culturam agri pertinet auferri non convenit*, and by the subsequent, *autem ibid. agricultores terrarum securi sunt, ita*

ut nullus inveniatur tam audax; ut personas boves & agrorum instrumenta aut si quid aliud, quod ad agrorum rusticorum operam pertineat, invadere aut capere presumat: & si quis hoc statutum violare presumpserit, in quadruplum albata restituat & infamia notam ipso iure incurrat, imperiali animadversione nihilominus puniendus, and Maranta de ordine jud. part. 6. Ad. 3. num. 31. relates, that this Law is confirmed in Sicilie, by an expresse Statute; and all these Laws seem to be founded, on Deut. 24. vers. 6. No man shall take the upper, nor nether Millstone to pledge: for he taketh a mans Life to pledge. *quod non emularetur*, as Grotius observes out of Philo, which are called mola & cattillus, l. cum de lanionis §. idem consultus. ff. de instructo vel instrumento legato.

III. By the foresaid Act of Parliament, the poynding of such Goods is forbid, in the time of labouring, but it is not declared to be a Crime; and the Lord Renton having in January 1666. pursued the Officer of the Court of Coldinghame, for poynding one of his Plough Oxen when they were labouring, before the Criminal Court, it was alledged, that no criminal Pursuit could be founded upon this Act, seing nothing could be criminally pursued, but that which was made a Crime, by a special Statute, and to which a special Sanction was annexed. Likeas by the constant Custom, many Actions of Spulzie were founded upon this Act; but no criminal Pursuit was ever thereupon intended. To which it was replied, that the contempt of a Law, was in itself a Crime; seing Disobedience to Authority, was in effect the Basis of all Crimes. 2. Illegal intrometting with another mans Goods, was a Crime, especially *ubi lex non solum non assistebat, sed & resistebat*, for Theft is nothing else but an unwarrantable Intromission, and as the taking of his Majesties free Ledges is a Crime, where the same is not warranted by Law; so the poynding of these Goods should infer a Crime, that being another Species of unlawful Execution. 3. This Act discharges such Executions, conform to the common Law; and by the Common or Civil Law, this is a Crime, as is clear by the Law above-cited: and whereas, it was alledged that no Sanction was annexed: It was replied, that where the Law annexes no Sanction, the punishment is there arbitrary; and there are many Crimes, both in the Civil Law and ours, to which no Sanction is annexed. The Justices sustained the Libel, and ordained the Pannel to go to the knowledge of an Inquest: The expresse words of the Interloquitor were, that the poynding an Ox in the time of labouring, is an injury and wrong, punishable by the Law, *pena applicanda fisco*. And thereafter the three Pannels were found guilty, though it was not expressly proved, that the Ox was labouring actually the time of the poynding, but only that he used to labour, and was in the Plough the Week before, and the Countrey was then labouring, all which are necessary Qualifications of this Crime, and so are necessary Interrogators; after pronouncing of which Doom, the Justices fined each of the three Pannels in forty pound Scots. And yet in June 1674. a Reply against lawfully poynded, being proponed in a Pursuit for Theft; the case was by the Justices referred, to be first civilly pursued. It was here also alledged, that by the 34 Ad. 4. Parl. J. 5. where Crimes may be criminally and civilly pursued, the civil pursuit ought first to be discussed; which was repelled, because, though a civil pursuit of Spulzie were intended, there could no defence, such as lawfully poynded, *authore patore*, &c. which are usual in other cases, be proponed here, seing though the Executions were formal, and the Decreet whereupon they proceeded irreduceable; yet to poynd a labouring Ox in labouring time, is in all cases unlawful, & ita cessat hoc casu ratio legis. 2. The Defender could not plead the benefit of this Act, except he first acknowledged, that the Wrong here committed was a Crime, for the Act runs only in such cases, as may be civilly or criminally be pursued.

IV. It

IV. it is observable, that albeit this Act relate to the common Law, yet they differ in many Points, as 1. The Persons of Labourers could not be apprehended by that Law, but by ours they may. 2. By that Law no distinction is made, whether there were other poindable Goods or not; but by ours, these particulars may be poinded, or Lands may be appryled; and therefore such as raise Criminal Letters upon this Act, should libel, that such Goods were poinded in labouring time, and that the Owyner, or Debitor had other Goods and Lands against which the Creditor could have had Execution: Albeit I think he is not obliged to prove this; but that this is, *ex eorum numero que allegari sed non probari debent*, yet if the Messengers Execution be produced, bearing that he searched, and could find no other Moveables, I think, that *eo casu*, the Messengers Execution should make Faith, except the pursuer offer instantly, to condescend upon these other Moveables that were extant, and be ready to prove the same. I find, that if the Messengers Executions bearing in an Apprysing, that he searched, but could find no Moveables, they are so far believed, that no contrary Probation will be received, for else all Compyryngs might be reduced: yet I think, that the case is not alike here, for the Act being so express, it should be sufficient to defend against a Crime, (though not to reduce a real Diligence) that other Moveables were extant.

Under the prohibition of this Act, are comprehended, not only the Goods that are in the plough, but these Horses which lead Foggage, for without these Land cannot be laboured; and so the reason of the Law extends to them: Likeas, the Act of Parliament expresses separatly, and distinctly Goods pertaining to the Plough, and that labours the Ground: nor are these words *that labours the ground*, exgetick only.

By these words, *in time of labouring*, are mean'd, not only when the Beasts are actually labouring, but the season of labouring, and that from the time of striking, to upseed time; and therefore Goods that had once tilled, though in October, seem not poindable, for then labouring is as necessar as in the Spring; and yet the contrary was found, the 15. of November 1627. and the 22 of November 1628. Because as is there alledged by Durie, October is not the Season of Labouring.

It may be doubted, whether Horse leading Foggage in June and July, can be poinded, for that is the season of that kind of labouring.

## TITLE XXXII.

### Bearing of unlawful Weapons.

1. What is the punishment of this Crime by our Law.
2. What by the Civil Law.
3. Who are Judges competent to it.

**I**T Bearing of Hagbuts, Pistols, and other Fire-works, were punished of old by amputation of the right hand, but by the 6. Act. Parliament 16. Ja. 6. the bearing of such weapons is forbidden, though no prejudice be done by the wearers, who may be pursued, either before the Council, or Justice Court, and the punishment by the Council is declared not to be corporal, but



but only confiscation of their Moveables, or fynning and imprisonment; But prejudice of any pursuit before the Justice Court, who it appears may inflict the former punishment of cutting of the right hand.

It would seem that by this Act the Pannel is obliged to give his Oath before the Justices, which is not usual in any Crime, except that of Usury; for the Probation by Oath is indefinitely subjoyned to pursuits before the Justices or Council. And albeit the Council does immediatly proceed, yet that probation by Oath seems not to relate solely to the procedure before the Council. For when the procedure before the Council is repeated, the probation by witnesses is only there mentioned. Yet I think there is an error in the printing of this Act, for it is very unreasonable, that when this Crime is proved before the Council by witnesses that no amputation shall be remitted, and yet this priviledge should not be extended to those against whom it is proved by their own Oath.

It is observable from this Act, that the Council may force such as are pursued before them to give their Oaths, albeit it may be alledged, that *nemo tenetur crimen contra se probare*.

By this Act likewise, all licences to bear thir Weapons are ordained to be past in Council, and to pay a composition to the Thesaurer, and to passe his Register and all the Seals, else to be null.

II. By the Civil Law, the bearing of these Weapons was a Crime also. *l. 11. C. ut armorum usus*. And by the Feudal Law, *c. 1. §. si quis. de pace tenenda*. & *tenebatur pana legis julie de vi publica*, which was arbitrary: And the Glossie observes, that the carrying of such Armes was repute publick violence, though no prejudice was done, which is consonant to the Act of Parliament. But it is strange that only Fire-works, or ingines should be forbidden by that Act. Nor can the carrying Pikes, Swords, or any other Weapons, be punished by that Act.

By the Civil Law likewise, the prohibit Arms were confiscat, and *Marfil. in prat. §. pro complemento, N: 12. Carerius & Clar.* declare, that by the custom both of Spain and other places, the Arms are confiscat, albeit there be no expresse warrant for that confiscation by the Statute, but it may be doubted if the true owner having lent them without being conscious to the Crime, should lesse them, and I think not.

But keeping of such Weapons at home is not punishable, neither by the foresaid Act, nor common Law, by which likewise it is lawful for such as travel to bear such Weapons, for their own preservation, & *generaliter licet portare arma defensiva*; but our Law allows no such distinction. And I remember that *John Macknaughton*, being pursued before the Council for bearing forbidden Weapons they repelled this defence, *viz.* that he was travelling (unless the journey could have been alledged necessary, for else the Act might still be eluded) and that it was the custom of the *Highlands* to go still well attended & armed: which defence seemed to some ill repelled, for self-defence, and the custom of the Countrey, excuses still from this Crime, *Farinac. de diver. crim. questi. 108.*

By the common Law, offensive Arms, such as Swords and Pistols, were forbidden, and the Bearers punished, albeit no prejudice followed; but the carrying Stones and Trees, and such other things as were not *ex sua natura offensiva*, was only punishable, if Violence was done by the Bearers, *l. armorum ff. de verb. sig.*

III. Thir pursuits are more ordinarily before the Council, than the Justice Court, and are ordinarily libelled as an Aggravation rather than a Crime. Thus I find *William Hamilton* pursued for wearing of Pistols, and presenting one to the Provost of *Edinburgh*, whereupon he came in will, and was banished the Realm during his lifetime, *1. Novemb. 1597.*

The prosecution of this Crime concerns only his Majesties Interest. And therefore the Dyet was deserted, because his Majesties Advocat, nor any to represent

represent him, did not concur, nor was the Libel raised at his instance, 20. July 1596. Mr. James Leask, against Andrew Reid.

# TITLE XXXIII.

## Beggars and Vagabonds.

- 1 How Beggars and Vagabonds are to be punished by our Law.
- 2 How by the civil Law.

Our Law hath been so charitable, as to provide for Beggars, by special Statutes, *Ja. 1. Parl. 1. cap. 25. Ja. 1. Par. 1. cap. 42. Ja. 4. P. 6. Par. cap. 70. Ja. 5. Parl. 4. cap. 21.* But sturdy Beggars (our Law calls them *Egyptians* oftimes, as the *French* calls them *Bohemians*) and Vagabonds should be proceeded against by the Sheriffs, and other Judges, and they may exact caution for them, and if they find none, they should be denounced fugitives, *Ja. 6. Par. 1. cap. 97.* and may be sent to publick work houses, or put in the Stocks, *Ja. 6. Par. 12. cap. 124. 144. and 147. Item. Ja. 6. Par. 15. cap. 262.* and if they be recept after they are denounced fugitives, their receptors are lyable for the prejudice sustained, and the parties damnified will have action against the Magistrats, within whose bounds or Jurisdiction these Vagabonds are recept wittingly, *Ja. 6. Parl. 11. cap. 97.* But this Act determines not, whether this wittingly relates to the receptor, or Magistrat; yet by the common Law, the adverb *scienter*, is still applicable to the person against whom the penal Statute runs; so that except the Magistrat know that the Vagabond was harboured within his bounds, it were severe to sustain action of damage and interest against him, though the receptor knew the Vagabond and did willingly recept him. But I think, that if the Magistrat did either omit his duty, he will be lyable, *nam scire & scire debere aequiparantur*, or if he was willingly ignorant.

I find that *A. B.* —being pursued criminally, for general receiving Vagabonds, this action was not sustained, but he was referred to the Kirk Session which it seems was done, because of the *147. Act. Parl. 12. Ja. 6.* whereby Ministers, Elders and Deacons, may nominate any two of their number, to enquire into this Crime, and whom his Majesty makes, and constitutes Justices as to that effect. It appears by a Proclamation, emitted by the Council, in *Anno 1603.* these *Egyptians* were ordered to leave the Kingdom, upon pain of death, which is ratified by the *13. Act. Par. 20. Ja. 6.* and upon that Act of Parliament, *Moses Shaw* and other *Egyptians*, Sorners and Vagabonds, were hanged the last of July 1611.

II. Our Law has in this, followed exactly, the Civil, for there is a title in the *Codex, de mendicantibus validis*, our sturdy Beggars: and the *novel, 80.* this Crime was also called by the *Athenians*, *αἴμα, sive otii ignavi de quo vide beigium, l. 2. quest. 27.*

## TITLE XXXIV.

Robbery, Oppression, *vis publica & privata.*

- 1 The several Epithets given to Robbery, and how it is distinguished from other Crimes.
- 2 Common Theft, and Stouthreif, how punished by our Law.
- 3 Several Decisions, as to this Crime.
- 4 How the assisting of Robbers is punished by our Law.
- 5 In what cases it is lawful to joyn against Robbers.
- 6 The punishment of oppression by our Law.
- 7 In what case the civil right is to be discussed, before the violence can be criminally punished.
- 8 How Oppression was termed by the Civil Law, and how it was thereby punished.
- 9 What Concussion is, and how punished.
- 10 Black mail how punished.

**M**EN may by diligence and circumspection, defend themselves against Theft, and these who steal clandestinely, shew a reverence, even to that Law which they transgress; but Robbery and Oppression are Crimes, against which there can be no fence: and in which these who violate the Law, contemn the Legislators. To defend them against these, men did associate themselves under Government, and renounced their native liberty, for the protection of Law: nor can Law justify the severity of its punishments, and the great exertions it requires, but by returning to these it commands, a sweet and pleasant security, against all rapine and violence.

I. When Theft is aggravated by violence, it is called Robbery, from the *Germane* word *Raube*; and is with us called *Stouthrieif*, *Stouth* signifying Theft, and *Rieff* signifying Violence: In which Crime, our Persons are endangered as well as our Estates, and so is ordinarily punished by death, even in these Countreys, where Theft is only punishable by pecunial mulcts, or whipping, and thus it was punished with death amongst the Jews, as is clear, by *Dauids* answer to *Nathans* Parable, though Theft was only punished by restitution; and though *Calistratus*, l. 28. §. *grassatores*, ff. de *penis*, seems to make such only punishable, if they Rob frequently, and in high ways, and with Arms, *grassatores qui praeda causa id faciunt, proximi latronibus habentur; & si cum ferro aggredi & spoliare instituerint capite puniuntur. Utique si sapius atque in itineribus hoc admitterent ceteri in metallum dantur, aut in insulas relegantur.* Yet by the custom of all Nations, Robbery is punished with death, though it be not reiterated; and I think, that Law must be only understood of such, as designed to Robb, *qui instituerunt*, who are punishable, though they actually Robbed nothing, and had no design to kill, but to plunder, *præda causa*, if they went out frequently, and to high wayes with that design, for if they actually Robbed, or had a design to kill, though they killed not, yet they are still punishable by death, by all Laws,

or the *epithet* *robber* *dim* *to* *repeated*.

II. The



II. The quality of frequent and common committing Theft and Robberies, is not only a quality that raises the Crime of Theft alone, from being punishable by restitution, to be punishable by death in other Nations, but by the 51. *Act. 1. Parl. Ja. 6.* It is declared, that *Landed men who are convicted of common Theft, Receipt of Theft, or Stouthreif, shall incur the crime and pain of Treason*; upon which *Act*, it was contraverted, whether the word *common*, was a quality and adjunct to be added to the receipt of Theft, and Stouthreif, as well as Theft, since the *Act* says but only common Theft, not common Receipt of Theft, nor common Stouthreif; and it was it was urged, that it was reasonable, that this should be understood of all, seeing it was that quality, which rendered them Treason. For simple Receipt, would not have been declared treasonable of it self; and by the fore said *l. 28.* the reiterating this Crime, aggravated it from Banishment, to death, and in the ordinary way of speaking, men cease not to repeat such words: Like as it was just, that as the crimes were in Landed men punishable, only by restitution, or death, if repeated so in Landed men, the punishment should grow proportionally, and infer death or Treason, if commonly committed.

To which it was answered, that the words of the *Act of Parliament*, are conceived disjunctively; Like as it seems, that if the Parliament had designed, to add the word *common*, to *Receipt* and *Stouthreif*, they would have added the same to prevent this objection: And it seems indeed, that *Stouthreif*, which is that species of Theft that we call Robbery, deserves to be punished as Treason in Landed men, though they do not commonly commit the same, because it being easier for Landed men to commit Robbery, and it being more probable, that they would Rob than Steal, this Crime ought to be as severely punished in them, as common Theft; and accordingly the fore said alledgiance being proponed for *James Wood*, the 21. May 1601. it was repelled.

III. In this process likewise, the said *James*, having been pursued for robbing the Writs and evidents belonging to *Boniton*, It was alledged, that the pursuer ought to condescend upon the Lands, to which these evidents belonged, because if that were condescended on, the Pannel would prove, that the said Lands, and consequently, the evidents did belong to himself; which alledgiance was likewise repelled; nor was it found necessary, that a Civil precognition should proceed in this case; And in June 1668. it was found that a Libel was relevant; bearing in general, that Jewels or Pearls were stolen, without condescending upon the particular number of them; and it being alledged for the *Mackgibbons*, Decemb. 8. 1676. that the Libel was not relevant, not condescending upon the persons from whom the goods were robbed, nor what goods were Robbed, but only in the general, that the Pannels did frequently rob the houses of *Garnitilly* and *Strasbuds* Tennents.

To this it was answered, that though where privat parties pursue, *ad interesse privatum*; such a condescendance is necessary, because the informers may know, nor can the private damage be repaired, except his losse be liquidly proved; yet when the pursuit is at His *Majesties* instance, and that an habitual, and constant trade of Robbing, and forning, is libelled, It is sufficient to libel in general, and if the speciality be not proved the Pannels have no prejudice, for they will not be found guilty, nor will the probation be concluding; but it is all one to His *Majestie*, which of His subjects be robbed, or what be taken away, it being His *Majesties* interest, that no constant, and habitual Robbery be committed in his Kingdoms; nor is there any thing more ordinary, than to sustain libels against such as are guilty of open Rebellion, without condescending upon the particular persons who were killed or robbed in that Rebellion. And whereas it was urged, that if the particular goods

alleged to be Robbed, were condescended on, the Libel might be elided by this suitable defence, *viz.* that they had a right to the goods, or had the consent of the owner; It might have been answered, that they were not precluded from such defences, by the generality of the Libel, for the Pannels might allege that the taking away of such and such goods could not infer Robbery, because they had a right to these goods, or were warranted to take them away by the consent of the owner.

The Justices sustained this Libel, notwithstanding of the generality foresaid.

Alexander Steil being pursued in August 1669. for stealing and Robbing evidents, writs, and cloaths out of Captain Barclay's house, who was his Master at that time.

It was found that the pursuer, behoved to prove, that the saids evidents were taken away by force, or breaking up of doors, and that the servants having of them was not sufficient to infer Theft, though he had delivered them to a third party; and albeit this should be proved, yet the Justices found this allegiance relevant, *viz.* that this Deposition alleged to be stolen; being given to the Pannel, that he might counterfeit the subscription, and he having no freedom to comply therewith, he did run away to the Lord Frie, and delivered up the same to him without any reward, which allegation was found relevant, as said is, though it seems to be contrary to the Libel, and as to the wearing cloaths, the Libel was not found relevant, except it had been proved that they belonged to Captain Barclay, and were under his lock at the time, since it was offered to be proved, that the servant had worn these cloaths publicly in his Masters service, which purged the presumption of Theft. It may be doubted what a poor servant could do, if he had broken up the doors really at his Masters desire, who had sent him home to bring papers, though he could not prove the command otherways than by his Masters oath, for his Master might always easily prove the breaking up of the doors.

IV. So odious is this Crime, and so frequent was it, that by the 21. *Act. Parl. 1. Ja. 6:* all such as receipt, fortifie, maintain, or give meat, harbour, or assistance to any such Robbers, are declared art and part, but it would appear that this Act strikes only where there are Letters of Intercommuning, and that because the Act it self bears, *to the effect it should be known to what purpose they Intercommuned*, and because it were too severe to punish men as Thieves, except they were *put in mala fide*, so to do, by publick Proclamation, or Letters of Intercommuning.

V. By the 227. *Act. Parl. 14. J. 6.* It is declared (for the same hatred against Robbers) lawful to all his Majesties Leidges to concur and joyn against Clann and Border Thieves, and to take and execute them; all Magistrates and Free-holders, being made Justices for that effect, by the said Act. But this part of the Act is now in desuetude; and it appears to have been but temporary, *quo ad* the power of executing, but Robbers may be lawfully seized on without Authority.

VI. Oppression is ordinarily but a quality of other Crimes, but yet there are sometimes special dittays founded thereupon, *per se*; and there are some particular Acts declaring several species of it to be punishable, as Reif, or by other specifick punishments mentioned in the said Acts; And thus it is oppression to compel the Kings proper Tennents to ride, or do service of Avantage, Carriage, Shearing, Leading, &c. and should be punished accordingly, *Act 21. P. 2. J. 4.* It is oppression to take Caups (that is to say, a duty for protection to be given by privat men to such as Thieves, and other great men) *Act 18. and 19. Par. 2. Ja. 4. vid. de verb. signif.* It is oppression for a Crafts-man to take custom, or any other taxation, from another of that  
same

same Craft, or for them to make privat Acts amongst themselves, prejudicial to the people, *Act. 42. and 43. Par. 4. J. 4. Act. 111. Parl. 7. J. 5. and Act. 4. Par. 19. J. 6.* It is oppression for Customers to exact more than their due, *Act. 46. P. 4. J. 4.* It is oppression to molest Magistrates of Burghs, and other Merchants to use their privileges and liberties, *Act. 26. Par. 4. J. 5.* It is a kind of Oppression, to exact more traught from Passengers, or greater prices for Weaving and handy-work, than what is allowed and usual. *Act. 21. and 23. P. 5. 2. M.* It is oppression to stop or make impediment of common high ways, to, or from Burghs, *Act. 54. Parl. 6. 2. M.* It is oppression for Officers to extort the Leidges, *Act. 33. P. 5. J. 3. & Act. 83. Par. 11. J. 6.* or to put out or put in the Roll of Assizours given to him by the pursuer. *Act. 88. Par. 11. J. 6.* In which last Act common oppressors are punishable by death: Oppression is also punishable by death, *Act. 42. Par. 4. J. 4. Act. 88. Par. 11. J. 6.*

VII. Because oftimes in thir cases, the Pannel pretends, that what he did take by force, was his own, or that he had a right thereto, therefore except the violence be very grear, the Justices use to ordain the matter of right to be first discussed before the civil Judge, as was found in November 1675. in the case of *Inglis of East-shields*, and in many other cases; and by the 33. Act 4. P. J. 5. It is declared, that *as for depredation, masterful reiffs, and spulzies particular dyets shall be set therefore at the discretion of the Lords, the matter being first Civilly discussed before them.* Upon which Act it is oftimes alledged before the Justices, that the cause must be civilly discussed before the Session, in all masterful reiffs, before they can proceed to cognoice thereupon; but notwithstanding of this the Justices do constantly sustain Criminal processes for Reiffs and Robberies, without any previous civil precognition; and they find this Act to be now in desuetude, as in the case of *Manimusk* 27. of November 1611. And I think, that by Lords, in that Act are not meant the Lords of Session, for that Act is two Years prior to the institution of the Session, but that by Lords, there are meant the Justices themselves, for there being no Session at that time, the Justices were Judges competent to many Civil cases, originally such as perambulations, &c. and to all civil cases, if they had a necessary connexion with, or dependence upon criminal cases. And therefore, where the person who was alledged to have committed Masterful Reiffs, or spulzies, could pretend that what he did was in prosecution of his own right. The Justices had a latitude to try the matter of right, first Civilly, but this was never necessary, for it is by the Act left to the discretion of the Judge.

It remains then to be considered, how far the taking away by violence what is really a mans own, can infer a guilt against him. Which Difficulty may be cleared in these few Conclusions, 1. That the thing violently possessed, though by a common Spulzie, and much more by a masterful Reiff, ought to be restored, *nam spoliatus est ante omnia restituendus*, and that though he who took away what was his own, could instantly prove his Right; and since this holds, where the Violence was only committed by a simple Ryor, it should by a stronger Consequence hold, where the thing was taken away by such violent means as amounted to a Crime, and so this should be no good Defence, either against a criminal, or civil Pursuit. 2. Not only ought the thing to be restored, but even the true Proprietar who intromitted with his own, by open Force and Violence is punishable, for the Law will not allow that any man should be Judge to himself, but much less that he should use Violence, and Force upon any account, and this were to invade or assume Jurisdictions, which is in it self a Crime.

The third Conclusion is, that if any man do by Force or Violence, extort from another, a Writ, or Obligation, which he could have obliged him in Law to grant, that Force is not only punishable criminally, but the Deed so



extorted is reduceable by a civil Pursuit : as was found in January 1675. Though it was alledged there, that such Force might be criminally punished, yet the Deed so granted could not be reduced, since such Deeds were only reduceable, where something might be restored, but here nothing was to be restored; since the Deposition alledged to be extorted by Force, depending upon a former Minut, by vertue whereof the Granter could have been compelled to have granted the same; and this was the same case, as if a Creditor should compel his Debitor by Force, to pay him what was his own, in which, though the Force be punishable, yet the Debitor could not repeat what he had justly payed, as is clear, not only by common Sense and Reason, but *l. 12. ff. quod met. caus.* *Julianus ait eum qui vim adhibuit, ut debitori suo ut ei solverit hoc edito non teneri propter naturam actionis metus causa qua damnum exegit quamvis negari non possit in Juliam eum de vi incidisse & jus crediti amisisse.* To which it was answered, that there could be nothing more disadvantageous to the interest of the Common-Wealth, nor a greater usurpation against Authority, than that every man should be his own Judge, and force the Executioner; and the Lavv justly presumed, that he had no legal Right, vvhould not pursue it in a legal vvhay, and if this vvhere allowed, every man vvould discuss his ovvn Suspension himself, by forcing his Debitor to pass from it, and vvould force the Heir of his Debitor, to give him Bond, or his Debitor himself, to fulfil all Minuts vvithout any legal Pursuits, every Master vvould thus thrust out his Tennents, and every Creditor force his Debitor to pay, by carrying him avvay Prisoner, and vvhen he vvhere that length he vvould alledge that *nihil illi deest*, and as to the former Lavv, it vvvas answered, that the civil Lavv in detestation of Force and Violence, did allow three severall Remedies to the person violented. *viz. Editum Pratoris quod metus causa, &c. Lex Julia*, vvvhich punisheth the Force as a Crime, & *decretum divi Marci*, all vvvhich Three are expressly mentioned in that Title, and though by the old Edict, and the *Lex julia*, he vvho forced his Debitor to pay vvhat vvvas justly due, could not be by these Remedies restored, *quia nihil deerat vim passus*, as the Lavv formerly cited does prove; yet, *ex decreto divi Marci*, vvvhich vvvas posterior to these Remedies (as *Marcus Antoninus* vvvas long posterior to *Julius Caesar*) even he vvho took payment of his ovvn, could not defend himself by alledging upon his Right: Which excellent Lavv is set down, *l. 13. ff. quod metus causa. Quisquis igitur probatus mihi fuerit rem ullam debitoris vel pecuniam debitam non ab ipso sibi sponte datam sine ullo iudice tempore possidere, vel accipisse, isque sibi jus in eam rem dixisse, jus crediti non habebit.* And *Faber* upon that Lavv doth excellently conclude, that this vvvas a just Supplement of the former Lavv: and *Cujacius* allowvs this Remedy, not only to the publick, but even to the privat Party, for *qui sibi jus dicit jus crediti non habebit*, which implyes an annulling of the Deed, *quo ad privatum interesse*. And *Cujacius* observes well that the Party forced, *potest condicere*, and how can it be imagined, that the Lavv would ordain the Extorter to be punished, and yet not restore that which was extorted, the publicks Interest resulting only from the privat Injury done to the Party, and as the Fisk uses not to pursue vvithout an Informer, so the privat Party injured vvould not inform, nor concur, since he could not expect any Reparation, and thus the Crime and Injury vvould remain unpunished: But even according to the *l. 12. and 14.* so much founded on, it is most clear, that they were not in the case of these Lawes, but on the contrary, that even by these Lawes, the foresaid Principle is just, since Restitution is still to be granted, *ubi actori aliquid abest & ubi damnum intervenit*; but so it is, that in this case the Pursuer is extremely prejudged by this Disposition craved to be reduced, *ex capite metus*, since if it were reduced, he vvould easily defend himself against

gainst the alledged Minut, upon many Grounds then represented. It was also urged, that though in the Restitution of Minors, the Law restores them only when they are Leas'd, since that Remedy is mainly introduced for their Advantage; yet in Reductions, *ex capite metus*, the Law designs mainly, that no man should have advantage by his own Oppression, nor no man be obliged without his own consent, and so it rescinds the Deed, though the Party be not leased, and the Edict it self says, *quod metus causa gestum erit ratum non habebit*, without considering Lession, & *quod ratum non est, irritandum est*, that is to say, is reduceable. And whereas it was pretended, that the former Brocard, *Spoliatus est ante omnia restituendus*, did only hold where the thing was taken away, *vi ablativa*, because that could be easily proved, but not in Deeds extorted, *vi compulsiva*, which Force depending upon inward Acts of the Mind, could not so easily be discovered, and could be easily mistaken.

To this it was answered, that though those two differ in themselves, yet either of them infer Restitution, as we see all along the Title, *quod metus causa*, and in the practice of our Reductions, *ex capite metus*. In both which, deeds extorted, *vi compulsiva*, are reduceable, and the persons injured restored against them, and since *vis compulsiva*, can infer more prejudice, than *vis ablativa*, since *vis ablativa* can only rob us of Moveables, whereas *vis compulsiva* can rob us of our Estates; It were strange that the Law should not assist the injured persons, most where they may be most injured; nor can it be denied, but that Compulsion falls as much under Sense, and so can be as easily proved as a Spuilzie can. For though it may be doubted whether some degrees of Force, should always infer Restitution, yet the Probation of these Degrees if once admitted, is always easie.

The Crimes answering in the Civil Law to Oppression, were *vis publica*, *vis privata*, & *concessio*. Those were punishable, *l. julia de vi publica*, who raised Arms, or did violently eject men out of their Houses or Lands, *§ 1. de vi publica* *l. 4. Basil. b. 1.* These who assisted the Oppressors with Men, are guilty thereof, and the punishment was, *aqua & ignis interdictio*. These were guilty of *vis privata*, who oppressed upon a private account, and the punishment was the Confiscation of the Third-part of their Goods, with Infamy.

*Concessio* was that Crime, whereby Money or any thing else was extorted by open Force, or who employed their Power and Authority as the Instrument of Oppression. I have seen Processes and Remissions relating to this Crime with us, and the punishment of it is Arbitrary, both by the Civil Law and ours.

The taking of *Black-mail*, is a kind of *Concessio* in our Law, and by *Black-mail* is understood, the paying of Money, or any Gratuity to Thieves, for their Protection, and by our Law not only the Takers but the Payers of *Black-mail*, are punishable as Thieves and Robbers, by the 21. *As. Par. 1. Ja. 6.* And Dittay is ordained to be taken up against them, *As. 102. Parl. 11. Ja. 6.* And the Reason why the Givers are lyable, is because they maintain the Thieves, and keep correspondence with them, and do not dilate them. but yet except there be something of Compliance, or a long tract of payment libelled, the Justices do not use to sustain payment of *Black-mail* by it self, as a Crime to infer any severe punishment, much less to infer the pains of Theft and Robbery, conform to the foresaid *As.*, that payment being ordinarily more the effect of Fear, than of Compliance.

## TITLE XXXV.

## Art and Part, Ope &amp; Consilio.

- 1 These Words Art and Part, explained.
- 2 The Act of Parliament, ordaining that Libels bearing Art and Part, shall be relevant, fully considered.
- 3 How far Advice and Counsel, do import Accession.
- 4 How far the giving order to commit a Crime, imports Accession.
- 5 How far the Command of a Superior excuseth.
- 6 How far the Command of a Father excuseth.
- 7 Who are constituted in Law to be Assisters.
- 8 How a Crime may be ratified, and what is the import of Ratification.
- 9 Whether Accessories can be pursued, till the principal Actors be first discussed.
- 10 Whether Complices and Accessories are to be punished by the punishment due to the principal Malefactor.

Not only these who are the actual Committers of Crimes, but these by whose Counsel, Direction, or Assistance, any Crime is committed, are likewise punishable, else the Law might be easily eluded, and the chief Contrivers might escape.

I. These who are Assisters by Counsel, or otherwise, are in our Law said to be Art and Part of the Crime, by Art is meant that the Crime was contrived by their Art or Skill, *eorum arte*; by Part is meant, that they were Sharrers in the Crime committed when it was committed, & *quorum pars magna*. The Civilians used in place of Art and Part, *ope & consilio*: And these who assisted, and are Art and Part, are by our Law called Complices, which Word is borrowed from the Doctors, for they call *Consiliarios fautores & instructores complices*, *Cater. pract. Crim. §. homicidium. num. 14.*

II. By the 153. Act. 11. Parl. 3. 6. It is ordained that nothing can be objected against the relevancy of that part of the Summonds, which bears, that the persons complained upon, are Art and Part of the Crimes libelled; by the relevancy of the Libel, our Law means that the Libel is *rite libellatus*. And I find the Term relevant, used by the Doctors themselves, in the same Sense that it is used by us: and thus *Gail. l. 1. obs. 86. judex debet tantum admittere articulos relevantes.*

The reason of the former Act is there rendered to be, because diverse Exceptions were formerly propounded against the relevancy of these Summonds, whereby Parties were frustrat of Justice; And it appears by that Act, that the Pursuer was before the making of that Act, obliged to libel, that the Defender was accessory to the committing, and so guilty of the Crime, in so far as, &c. and so was forced to condescend upon the manner of the Accession, which seemed unjust to the Parliament, because (as I conjecture) the Accuser could not know all the Accession, before the Examination of the Witnesses; for it is not lawful to witnesses, *prodere testimonium*, to declare what they will depone: and this made it impossible for the Pursuer to condescend exactly; whereas if he erred in exact libelling, the Pannel or Defender was assailable, because the Probation did not quadrat with the Libel. \*As for instance, if a person



son was accused for accession to the murder of one, in swa far as he gave direction to A. B. to kill him, possibly the defender was guilty of accession, though not by giving direction; yet by counselling A. B. or by directing P. or any other, to commit murder. In these and the like cases, the Pannel was guilty, and yet could not be condemned, because the Libel was not proved. Yet, upon the other hand, it seems hard, that such a general Libel as this, should be relevant; since it were as reasonable to Libel in general, that a person is guilty of murder, which generally would not be allowed: Likeas the defender seems by this precluded of many defences, which would be competent to him, if the Libel were more special. And by the practice of other Nations, the Libel must condescend specially upon the manner and nature of the accession: But that which seems to me most inconvenient, is, that the Affizers are Judges to the relevancy of the condescendency, which infers art and part. Albeit many questions, *in jure*, are there started, which are very intricat, and which have troubled the greatest and most accurate Doctors; for by our practise, the pursuer, who Libels art and part, will not be obliged to condescend how the defender is art and part, or accessory to the Crime committed, as was found in the pursuit at *Sinclars* instance, against Captain *Barclay*: But the Libel being relevant, when art and part is Libelled, the defender must go to the knowledge of an Inquest, and probation is thereupon led; in which many impertinent and irrelevant Interrogators are propounded; whereas, if the Justices were Judges to the relevancy, no impertinent Interrogator would be allowed, since nothing could be interrogated, but what were found to depend necessarily upon the accession, which was found relevant. As also, after the probation is closed, the Advocats upon both sides are forced to debate the relevancy of the probation, and how far the accession is relevant; and here Laws, Decisions, and Doctors, are alledged to Affizers, who understand neither. As for instance, if art and part of Murder be Libelled, probably the pursuer will interrogat if the witnesses heard the defender say, *that it were no fault though the person who is killed were stabb'd*, or approve the murder, after it was committed; upon which much debate might arise, for the Defenders Procurators would contend that the article was not relevant: And though the Justices did allow, or the Affizers did desire, that the witnesses should answer to these Interrogators, as they usually allow all Interrogators, reserving the relevancy to be debated after probation is concluded; then a learned debate would ensue before the Affizers, after closing of the probation, upon these points: So that the Affizers are against the intention even of our Law, Judges to the relevancy, and to the points of Law; by whose ignorance also the Leidges are oftentimes much prejudged. But when the pursuer designs to have the relevancy of his condescendency judged by the Justices, he uses to Libel, that the Defenders are art and part of the Crime Libelled, in so far as they gave order, or advised the committing of it, &c. *quo casu*, the relevancy of art and part being specially condescended upon, is decided by the Justices, who are Judges to all that is in the Libel.

Though it be sufficient to Libel generally, that the complices are art and part yet the Libel must bear expressly who are complices; for it is not sufficient to Libel who are complices generally, but their names and designations must be specified. *K. Ja. 6. Parl. 6. Art. 76.*

Because the Affizers are Judges to the relevancy of Art and part, and that the debates made to the Affize are not upon the record, being only delivered, *in voce*, therefore it is that there are but few decisions here adduced for clearing the relevancy of this part of the dittay.

To the end that all the Leidges who may be affizers, may understand what accession is relevant to infer a guilt, they will be pleased to understand, that

one may be art and part by deeds preceeding the Crime, either by counsel or command, *consilio aut mandato*, by deeds concomitating the Crime, as by help or by countenancing, *ope & assistentia*, or by deeds sublequent to the committing of the Crime, as by rathabiting or recepring, all which I shall treat separatly.

III. How far the advising, and counselling a man to commit a Crime, is punishable as an accession, and art and part of that Crime, is thus resolved by the Doctors; if (say they) the committer of the Crime, would have committed it however, and though he had not been advised thereto, then the adviser is not lyable, so as to suffer the same punishment with the committer, but it is to be less severely punished: whereas, if the committer of the Crime would not have committed, and perpetrated the Crime, if he had not received that advise, then the adviser and committer are equally to be punished, *Clar. quest. 89.* But I am not satisfied with this opinion, for since the adviser did all that in him lay, to have the Crime committed, and that the effect followed, he is surely as guilty, as if he had committed it; seing in Crimes we look to the design, and not to the event, *in maleficiis spectatur voluntas non exitus: & maleficia propositum distinguunt*, at least the adviser is equally guilty, whether it had been committed, with, or without his advice, even as he had been guilty, in case of assistance, though the Crime would have been committed without his assistance; nor is guilt spared by lessening: And it is impossible to know whether the committer would have committed it, without the advice and counsel given. Other Doctors are of opinion, that in atrocious Crimes, the adviser and committer are equally punishable, which certainly holds in Treason; but that in lesser Crimes, the Adviser is to be less severely punished than the Actor: And this distinction I like better, and is more consonant to our Practique. In our Law advice and counsel comes under *Art* for advice is a species of contrivance and art; and therefore advisers may appear in our Law to be punishable, as the principal offenders, seing Art and Part is punishable, as the principal Crime with us; Yet the Council uses to mitigate the punishment, where the Crime is not atrocious: And the Judge should here consider, whether the adviser gave the Counsel upon the account of former malice, conceived by himself; Or if it was only given in resentment of any wrong done to the committer, and he is to be more severely punished in the first case, than in the last. 2. In the case of advice, the advisers age is much to be considered; for though minors, and these who are drunk, may be punished for Murder, yet it were hard to punish them for advice. 3. The words in which the advice were conceived, should still be interpret most favourable for the adviser, for words are capable of several, and distinct senses, accordingly as they are understood by the speaker; and words do vary by the accent, or punctuation. 4. If the adviser retreated his opinion, he ought not to be punished, if he thereafter dissuaded the committer: but some require, that *eo casu*, he do intimat to the person, against whom the advice was given, what danger he is in, for else the advice once given, may occasion the Murder, tho thereafter disowned.

IV. He who gives order to commit a Crime, is in our Law, *Art and Part* of the Crime committed, as was found in *John Mackintoshes* case, the 11. of *May 1673* And is in the Civil Law punishable, in the same way and manner with the principal Party, whether that principal, or chief Committer, would have committed the Crime or not, without that *mandat*, *nam quando mandatum cadit in delictum non quaritur an mandatorius per se commisisset* *Gomes. in §. penales just. de actionibus.* And seing this distinction holds not, in *mandato*, I see no reason vvhy it should hold, in *consilio*.

Not only if one give order to commit the Crime, is he liable as, *Art and Part*, but

but if he give order to do that which is inseparably joined to the commission of it ; and even if he give order to do that, which being unlawful in it self may produce the crime ; and thus, if one give order to wound a Man, it is thought, that if the person die of the Wounds he receives, the Giver of the Mandat is guilty of the Murder, except the Order be restricted to wound with a Stone, Club or some such Weapon, as is not mortal ; for in that case, the Committer is only punishable, *pæna extraordinaria*, and by an arbitrary punishment, not reaching death, *Clar. quest. 89. num. 5.*

What words will infer a Command, cannot be determined ; but it was found in *Mackintoshes* case, that his desire to bring *Bruchdarg*, who was killed, dead or alive, did not infer his being Art or Part of the Murder ; for he having a Caption against *Bruchdarg*, he might desire the Messenger, or his Sons to pursue him, if he resisted the Caption. And yet if the Words can import properly no other sense, than such as would infer a Crime, the speaking of them will infer Art and Part ; and thus *Frazer of Culbochie*, being pursued on the 9. of July 1675. for deforcing a Messenger, he was found guilty, because it was proved, that after he was apprehended by the Messenger, he cryed to his natural Son to come up and help him, and to give these men their Reward ; whereupon his natural Son did invade the Messenger, and he thereupon escaped. And in general, I think Words should be very clear, and spoke too by a person, who hath previous Malice, else they ought not to infer death, for Words are oft spoke in Jest, as when one of our Kings desired those of *Caithness*, to go and sup their Bishop in Broth.

It is determined also by the Doctors, that if the Giver of the Mandat refer the committing of the Crime to a third Person, and he to a Fourth, if the Crime be committed by the Third or Fourth, that all of them are punishable with the same punishment. *Bald. in l. 1. §. nec autem, C. de caduc. tollend.* But seems hard, seing the person was not killed, in that case, by the order of the first Committer, and possibly the Discretion of the person, to whom the first Mandat was given, was considered to be such, that he would not execute the Mandat ; and many cases may fall out, whereby it might have been, that the Giver of the Mandat, would not have given the Mandat to any other, and therefore, *Capoll. Cantela. 39. & Menoch. de arb. casu. 353.* are of opinion, that if the Murder was committed by any other than him, to whom the Commission was granted, that the Giver of the Mandat is not lyable in that case, and generally they conclude, that if the Receiver of the Mandat, did exceed his Mandat any manner of way, that then, if the Crime which was ordered to be committed, was a mean and smal Crime, the Giver of the Mandat is no way to be punisht : But if the Crime was atrocious, then the Giver of the Warrant is to be punished, *pæna extraordinaria*, by an extraordinary punishment, for he who gives order to commit an atrocious crime, incurs a punishable Guilt, in the very giving of the Order, *Menoch. ibid. num. 9.* They likewise determine from this Reason, that the commanding to kill *A.* if he be not killed, but *B.* be killed, is punishable by an extraordinary punishment : The like also holds, if the Command or Mandat did bear to commit the Crime in one Moneth, and it was not committed in that Moneth, but many other, *Menoch. ibid. num. 21.* Though Mandats in civil cases are only probable, *scripto vel juramento*, yet in Crimes they are probable by Witnesses, as all Crimes, and Art and Part are.

V. How far the Mandat, Warrant or Command of our Superiors excuses, is variously debated by the Doctors ; but their Dictats may be resolved in these Conclusions, 1. The Commands of the Prince excuses altogether in lesser Crimes ; but in atrocious Crimes, it excuses only from the ordinary punishment, *metus pænam attenuat non in totum tollit*, for the Committer in this case doth

not



not commit the Crime, *dolo malo* & *qui citra dolum deliquit*, *ordinaria pena non punitur*, & *illi qui aliquid adversus suam voluntatem agit crimen non adscribitur sed cogenti*, cap. 1. 2. & cap. 32. quest. 5. The Command of the Magistrat, acting as a Magistrat, or a publick Person, excuses or defends the Committer, from the ordinary punishment, in atrocious Crimes, and from all punishment in lesser Crimes, *l. quanquam* & *l. quod princeps ff. de aqua plu. arcend.* A Mandat given by a Master to his Servant, excuses him from the ordinary punishment, when the Crime is atrocious, and the Master is known to be cruell. And thus I have seen the Servants of one who was hanged for Robbery banished only, because they knew not that their Master was a Robber, and that was the first Act; whereas if these had continued in his Service thereafter, they had been hanged, notwithstanding of both his Command, and known severity, seeing how soon they knew him to be a Robber, they should have deserted his Service; and by the 19. cap. num. 9. stat. Will. the Servant is punishable though he obey his Master, if he do not desert his Master, or desert his Service. In lesser Crimes the command of the Master excuseth altogether, *l. liber homo ff. ad l. aquil.*

V I. The Command also of a Father excuseth the Son, in lesser, but not in atrocious Crimes, except other favourable Circumstances concur; and thus John Rae vvas not put to the knowledge of an Inquest, because he was young, and had concurred in the Theft, at the Command of his Father, 1. January 1662. All which is most fully treated by *Menoch. de arbitr. Caf. 353.* And I find in our Law, that a Wife is lyable to the ordinary punishment, though she obey her Husband, in committing of atrocious Crimes. *Stat. Will. Cap. 19. num. 8.* From which I conclude, that by the same Statute, she had not been lyable in lesser Crimes.

V II. The Assister is Art and Part of the Crime by our Lavv; and Assistance by the Civil Lavv, and Doctors, is variously punished, for these vvho give Assistance before the Crime be committed, are punishable in the same manner wth the Committer, *l. nihil ff. ad leg. Cor. de siccar. nihil interest occidat quis an causam mortis prabeat*, but this Conclusion holds, only where the Assister knew not that the Assistance he gave, tended to the Commission of the Crime; which Knowledge is not presumed, but must be proved: This Conclusion also holds, only where the Assistance did influence the Crime immediatly, but not in remote Assistances, such as the lending of Arms, for remote Assistance is only punishable *pena extraordinaria*, *Menoch. de arbitr. caf. 349.*

Assistance given during the Commission of the Crime is also punishable in the same manner as the principal Crime, except the Assistance given be very remote, or that the Assister was ignorant, as if one should assist a person to drive away Cattel, which the Driver said to be his own Cattel.

It is here resolved by the Doctors, that he was in Arms upon the place where the Crime was committed, is reputed an Assister, if he stood very near the place, and was a known Enemy to the person killed, or a known Friend to the Committer, and had no business else in that place, at that time; or if the Invader wax'd bolder, or the person invaded weaker by their presence: But if these or such like Circumstances concur not, a meer By-stander is not Art and Part. And I remember that it was decided in the case of *John Mackintosh*, that naked presence was not Accession, *si navabat operam rei licita*, as the assisting a Messenger; and in the case of a Baxter, who was pursued for the Tumult, in anno 1666. at which time, *nuda assistentia*, was not found punishable. And it is so ordinary for people to run together, where noise or confusion is, and the Assistance is oft-times too advantageous, either to relieve the Weaker, or to separat and red, as we say, both Parties; that it were

were unfit, as well as unjust, to punish meer By-standers: but this depends upon many Circumstances, & est quaestio arbitria addit. ad Cl. quest. 90. num. 17. yet I would advise the Redder, or Assister, to cry, tha he intends to do no prejudice to either Party, or not to interest himself, except he be known to be very neutral.

These who kept the cloaths or baggage of the committers, are guilty of assistance. *Joh. de Annon*, as are these also who hindered others to rescue the persons invaded.

Assistance given after the Crime is committed, scarce deserves the name of assistance, as *Bartol.* observes, ad l. 3. §. 51. *quisquam ff ad Stilian.* And here fore the Laws of *Millan* do only inflict a pecuniary mulct in this case, as *Menoch* observes, cas. 349. And I have seen the Council inflict only an arbitrary punishment upon him who assisted to make the escape of a person who had recently committed a murder. But in general, I prove *Bartol's* Doctrine, who thinks, that Whether the help and assistance was given before the committing, at the time of the commission, or after it; yet the assister is punishable as the chief Actor, if the Commission of the Crime was resolved upon by both at the beginning, & before the Crime was committed, & ita spes data auxilii ad evadendum dicitur auxilium ad maleficium committendum, *Bartol.* ad l. furti. ff. de furto, else the Crime is not punishable in him who assisted only after it was committed, as severely as in the chief Actor. But the Doctors do not distinguish here, whether the Crime would have been committed by the principal party, though the assisters had denied their help; yet does this lessen the assisters guilt, though it does not distinguish it, *Clar. quest. 90. num. 7.* and so lessens the punishment in many cases.

VIII. The ratifying a Crime is not punishable, according to the Doctors, in Crimes which are chiefly committed to satisfy the lust of the offender, as if one should ratifie the Adultery committed by another, meerely to affront the Husband, *quo casu*, the Doctors think, that the ratifier may be punished arbitrarily; but the ratifying Crimes which are chiefly committed to offend others, as Murder, Theft, &c. is punishable, if the Crime was committed by the actor, in the name of the ratifier, and if the ratifier knew it was committed in his name, when he did ratifie it; but except these two concur, Lawyers think that the ratifier is not punishable: and yet in the general, the approving or owning Crimes, seems to be of ill example, and therefore punishable in some degree, by the example of that excellent Law, l. si quis §. qui abortionis ff. de panis.

By our Custome, ratification, or ratihabition of a Crime, as we call it, falls not properly under art and part, no more than under the general word *auxilium*, except the ratifier had done some deed, or been in some accession to what was done before the Crime was committed, as was found in *Mackintoshes* case, 11. June 1673. For it were hard to infer a Crime from any words approving the deed, it being most ordinar for men to say it was well bestowed, or I am glad, when they hear of the Murder of him whom they would not have killed, as *Bart.* observes; and therefore it seems not to be punishable by our Law, which punishes only either the Crime it self, or these who are art & part. And I remember, that when the Laird of *Assint* was pursued as accessory to the murder of *Montrose*, in swa far as he had at least ratihabited the Crime, having vaunted, that he had taken him prisoner at his own house, & jactatio & gloriatio, were punishable, as *Menoch* observes. *de arbitr. casu*, 331. Yet the Parliament inclined not to punish him, if nothing else could be proved. But whatever may be said of ratihabition in general, yet certainly, ratihabition of Treason, is punishable as Treason; and it may be also contended, that the excepting of a reward by one, as if the Crime had been committed by him, is punishable, since that reaches further than a naked ratihabition; so that cer-

tainly *Affint* had been punished as a Traitor for that accession, if he had not been secured by an Act of Indemnity.

IX. There remains yet two practical questions to be resolved; The first is, whether such as are accessory can be pursued, till the chief actors be first discussed, and either found guilty, or absolved. And that the chief or principal actors ought to be first discussed, seems most reasonable. 1. Because it is the nature of what is accessory, to follow, and not to precede that to which it is accessory. 2. The principal party might have a defence, which the assister doth not know, at least cannot prove. As for instance, if a man be pursued as art and part of driving away Cattel, possibly he was but a servant to the person who did drive them, and who, if he had appeared, had proved that the goods were his own; or if he were pursued as art and part of convoking the Ledges, or of rising in Arms; possibly if the principal convocator were pursued, he would alledge he had done so by warrant from Authority, and would produce his warrant, which none else could have in keeping. 3. By the opinion of *Clar. quest. 90. num. 6.* & other Doctors, *quando proceditur contra aliquem tanquam quod praestiterit auxilium delicto debet primo in processu constare principalem deliquisse.* 4. By the 26. Chap. 4. Book, Reg. Maj. entitled, *Of the order of accusing Malefactors for Crimes*, it is said, that the principal Thief should be pleaded & discussed before him who commanded the same to be done, or before the resetter. And in the 4. verse of that Chap. it is generally said, and so it is manifest, that the commander or resetter shall not be charged, till the principal doer be first convicted by an Assize. From which words, and from the general Rubrick, it is clear, that this conclusion holds, not only in Theft, but in other Crimes. Likeas, *Skeen* in his Annotations upon these words, observes from this Text, that *complices criminis non possunt accusari ante principalem malefactorem, nam sicut remota principali removetur accessorium, ita absoluto malefactore absoluntur complices & consentientes*, and cites for this opinion, *Gloss. in cap. 1. de offic. jud. delegat.* which conclusion is also clear, as to Theft, from the 83. Chap. quon. attach. Upon which Law a verdict tyling *George Grahame*, as receptor of Theft, was rescinded, by warrant from the Council, because the principal Thief was not first discussed. And as to all Crimes, by the 29. Chap. Stat. David 2. entitled, *The complices should not be punished before the principal malefactor.* It is also observable from the last vers. 26. chap. lib. 4. Reg. Maj. that the principal Malefactor should be not only accused, but convicted by an Assize, before the complices can be accused; so that it is not enough the principal actor be declared fugitive, which is likewise conform to *Clar. quest. 90. num. 6. nam non sufficit*, saith he, *contumacia facta*, which answers to our denouncing fugitive, as I formerly observed. I find likewise that by the Law of England the principal ought to be attainted after verdict or confession, or by our lawrie, before any judgement can be given against the accessory; but the principal must be surely kept until the accessory be attainted, *Bolton. cap. 24. num. 38.*

Notwithstanding of all which, *Charles Robertson* being pursued as accessory to the casting down of a house belonging to *Jollie*, which house was libelled to have been cast down by his Sons & Servants, at his command. The Justices found that he might be put to the knowledge of an Inquest, albeit the children and servants were not first discussed, because the Act appointing a Libel to be relevant, bearing art and part, did abrogate the foresaid, 4. verse. 26. Chap. 1. 4. R. M. since such as are pursued as art and part are all principals: And the Advocate alledged, that it were absurd that the King should be prejudged by the absence of the principal Party. To which it was answered, that the Act of Parliament, and the Law cited out of R. M. were in *materia diversa*, and very



very consistent, since the one determined only the manner of procedure, and the other what Libel was relevant, and since that Act it was constantly found that the Thief behoved to be punished before the Reletter, which shews the foresaid Law of the Majesty is not abrogated; nor was the King prejudged, seeing if the principal party were discus'd and denounced fugitive, the accessory might be proceeded against, but on the contrary, the Liedges would be much prejudged, if this order were not observed, for probation might be led against absents, *eo casu*, contrair to the fundamental Law of the Nation. V. g. if A. B. were pursued as hounder out of C. D. to commit a Murder, probation behoved to be led that C. D. committed the Murder, albeit absent, else the hounder out could not be punished, *nam primo debet constare de corpore delicti*: Nor can any man be guilty of hounding out, except where the Crime is committed. And it were not only against our Law, but against reason, to suffer Witnesses to be led for proving that the person who was absent committed the Crime: For in that case his greatest enemies may be led as Witnesses, and his strongest defences may be omitted; and though the probation led against him in absence will not be concluding, yet *semper gravat famam*, and leaves still a disadvantageous impression.

In this case it was likewise found, that ratihabition of a Crime might be inferred from the said Charles Robertson his reletting the committers of the Crime, though they were neither declared fugitives, nor Letters of Intercommuning against him: And his saying these words, *They did too little, and I wish that they had taken Collop out of Check*, was a ratifying of the Crime, since the Crime was committed by his own sons and servants.

X. The second Question is, whether the complices, & such as are art & part of a Crime, should be punished by the punishment due to the principal Malefactor? That they should, seems clear by the Act 151. Parl. 12. K. J. 6. where the Libel bearing art and part, is ordained to be found relevant, which implies, that art and part should infer the punishment concluded in the Libel; for that is only relevant which can infer the conclusion. 2. It is said, *cap. 38. quon. attach.* and then it shall be conform to that which is said, *consenters and doers should be punished with the same pain.* 3. By constant custom in all Criminal Courts, art and part is punished as the principal Crime. Notwithstanding of all which, I think, the foresaid conclusion very rigorous, for *pæna est commensuranda delicto*; and to punish the more and the less guilty equally, seems against nature and Justice: And by the Laws of all other Nations, and the opinion of all Doctors, accessions are punishable according to their proportional degrees of guilt; and albeit the Act above cited, sustains the Libel, yet it ordains not the punishment of art and part, to be the same with the punishment of the principal offenders; but though the Act did bear the same expressly, yet by the opinion of the Doctors, a Statute bearing that such as are accessory shall be punished as the principal malefactors, is to be restricted, *ad opem quæ dedit causam maleficio, & non de quolibet modo auxiliandi*, annot. ad clar. quest. 90. num. 28. It would therefore seem just, that not only the Justices, or parties, should make application to the Council, and interpose that the punishment should be mitigat according to the degrees of the guilt, as the custom now is, but that the Justices should have an innate power to proportion the punishment to the guilt proved; for none can understand so well the nature of the guilt, as the justices who hear the probation: and it is hard that the poor Pannel should lye under so great hazard, as to be exposed to a capital sentence, whereas it may be the Council will not sit so soon, as that he may interpose with them.

*Some Crimes punished amongst the Romans, which are not directly in use with us.*

HAVING finished in the last Title what belongs to those Crimes, which our Law punishes directly, I resolved here to touch overly even those Crimes which are little considered among us, not only that we might thereby know the *Genius* of that wise Nation; but that we may consider how far it were fit to renew amongst us these excellent Laws.

The *Romans* considering how destructive those were to the Commonwealth, who indeavoured by all indirect means to screw themselves into publick Employments, did therefore make this indirect dealing to be a Crime, and called it *Ambitus*, which punished *lege julia*, those who gave Money, for making themselves Magistrats, or that they might attain to Honours.

It is commonly thought, that how soon the Power was transferred from the People to the Senate, and from the Senate to the Prince, this Crime ceased, because the Prince having the sole Power of bestowing Magistracy and Honour, is still presumed in Law to bestow them upon those who deserve best, *Gronoveg de leg. abrogat. ad h. t.* But yet I see not why the Prince may not justly cause punish such who have wronged both the publick Interest, and his favour, in prostituting both to so unworthy a Sale: And since Commissioners for Parliaments, and Magistrats of Towns are still elected by plurality of Suffrages, I see not why such as bribe the Electors may not be lyable to the same Accusation.

The punishment of this Crime, was Deportation which was much like our Banishment, and in the lesser Towns it was punished by a Fine of an hundred Crowns, and Infamy; and since it is a kind of bribing, I think it should be punished with us as such.

*Residuorum Crimen*, was committed by him who converted the publick Money with which he was intrusted, to his own private use, and was punished, by fynyng him who was guilty in a Third more than he owed.

This Crime is punished by no express Law with us, but that this is a Crime with us, appears clearly from its being excepted from the late Act of Indemnity amongst the other Crimes. The Words whereof are, *Excepting all privat Murders, &c. and the Accompts of all such persons, as have intromitted with any of his Majesties Revenues, publick Impositions, Excise, Fines, Forfeitures, Sequestrations, and all other publick Money, for which they had not order, Warrant, or Assignment, ( for their own privat use ) or for which they have not duely counted, and received Discharges thereof from such as pretend to have Authority for the time to do the same.*

I doubt not but the Exchequer might be Judges competent to this Crime, if committed by their own Members, and the Council, if done by any of his Majesties Servants, since there can be no greater Injury done to his Majesties Government, than to abstract or invert his Money, which is the Nerves, not only of War, but of all Power.

*Peculatus*

*Peculatus*, is a stealing of the publick Mony, as the other was a concealing of it, and this was punished in publick Ministers capitally, *l. un. C. b. t.* Though other Thefts was not capitally punished among the *Romans*, so atrocious a Crime did they judge the breach of Trust; and so easy a thing it is for publick Ministers to steal publick Money if they please.

This Crime is certainly punishable with us by death, since all Theft is so punishable: *Plagium*, was the stealing of Men, and was punishable by death, *l. 7. & ult. c. b. t.* Which agrees with the Law of God, *Exod. 21. 16. Dent. 24. 7.* And with us *Egyptians* and others stealing Children, have been likewise punished by death, and such as force away Men to be Souldiers, should be lyable to the same Punishment, though the Council uses to punish them only by an arbitrary punishment; And such as take away mens Children upon pretext to marry them, before they come to the years wherein they may give a legal Consent (which is 12. in Women, and 14. in Men) ought in my judgement to be so punished. I have treated *crimen repetundarum* in the Title *Brybing*, & *Crimen annonæ*, in the Title *Fore-stallers*.

I shall end this first Part relating to Crimes, with *Theophils* Apologie subjoyned to this Title of Crimes. *ἀλλὰ περὶ τῶν κοινῶν διαστροφῶν ἀρετὴ ταῦτα διδάσκει, ὅτι δυνατόν ἐστιν δεῦξασθαι τοὺς ἀδικτοὺς, διὰ τοῦτο παραδύναται.*

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## *The End of the First Part.*

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The End of the Fifth Part.

PART

# PART II.

## TITLE I.

### Of Jurisdiction in General.

- 1 *Jurisdiction defined, and divided, in imperium merum, mixtum & Jurisdictionem simplicem.*
- 2 *Jurisdiction is either ordinary, or delegat.*
- 2 *It is either cumulative or privative.*
- 4 *How a Jurisdiction may be prorogat.*

**T**He Civilians do treat of Jurisdiction very learnedly and profusely, but since most of their Dictats are very remote from our Practice in Scotland, I resolve to clear only such general terms as are borrowed by our Law from that of the *Romans*.

I. Jurisdiction may be defined to be, a publick Power granted to a Magistratto cognosce upon, and determine Causes, and to put Sentences following thereupon in execution, in such way and manner as either his Commission, Law, or practise do allow.

Jurisdiction was by the Civil Law divided in *merum imperium, mixtum imperium, & jurisdictionem simplicem*. *Merum imperium, est habere potestatem gladii ad animadvertendum in facinerosos, & potestas etiam appellatur. Mixtum imperium est potestas qua jure proprio Magistratui competit cui jurisdictio inhaeret & inest, & dicitur mixtum quia cum jurisdictione est conjunctum. Jurisdictio simplex differt secundum Bartolum à mixto imperio in hoc, quod imperium mixtum expediatur judicis nobili officio, jurisdictio judicis ordinario.* With us the Justices have only a criminal Jurisdiction, the Lords of Session and Commisars, a merely civil Jurisdiction, Lords of Regality, and Sheriffs a mixt Jurisdiction, partly Civil, partly Criminal. But in all Jurisdictions, though merely Civil, there is still an innat Power, to punish even criminal-ly, such as offend and disturb even the Civil Jurisdiction. Thus the Lords may ordain such as strike any in the Parliament House whilst they sit, or falsify Papers produced before them, or abuse any of their own Number, to be degraded, or banished, or to pay a Fine, or to have their Tongue bored, &c. according to the Nature and Merit of the Offence. For in Law, when any Power is granted, every thing is also granted which is necessary for explicating or executing that Power.

II. Jurisdiction is divided likewise, in *ordinariam* & *delegatam*, and here it may be doubted, whether the Power of judging Crimes, which is *merum imperium* can be delegat? according to the Civil Law it could not, *l. 1. c. 1. 70. ff. de regulis juris*, and being Crimes are of so great Concernment, that *industria persona in electione judicis respicitur*, there is no reason why they should be cognosed by Deputs. Ordinary Commissions with us, also bear a power of Delegation, vvhich were unnecessary, if the povver of Delegation were inherent naturally in Jurisdiction. And albeit I have seen Justice Deputs delegat others to represent them in the Justice Court, yet this Practice seems to want both Warrant and Reason. And it is observed by *Craig*, pag. 192. that *potesstatem gladii qui ab alio quam a principe habet, nemo potest delegare*: and by *Balfour*, cap. 63. That a Barron cannot delegat any person to judge in the matter of Blood, except the said Povver be specially allowved him. But the Law allowvs even to Deputs, though they have no Povver to delegat others, a Povver to appoint another to judge for them in cases of necessary absence. *l. ff. de off. ejus cui mand.* vvhich Lavvyers do also allowv, *ex paritate rationis*, to such as are sick, *Bart. ibid.* And the Reason of both is, least the Common-vvealth suffer by their Absence or Sickness, for it is necessary that Crimes be presently tryed.

III. Jurisdiction is divided by our Law, in *cumulativam* (for so we call that Jurisdiction which is competent to several Judges, and whereby they may prevveen one another, and thus Sheriffs, and Barons have a cumulative Jurisdiction in blood weits) & *privatam* (for so we call that Jurisdiction which is competent peculiarly to any one Judge.) This distinction is used very much in our Law, and especially by *Craig*, pag. 192. who layes it down as a rule, that *omniscuria delegatur tantum cumulative, sed nunquam privative; non est enim quasi translatio juris ex una persona in alium sed tantum mandata jurisdictio qua non obstante jurisdictione sive mandato adhuc remanet in delegante nec minus dominus post investituram vassallo factam retinet jurisdictionem & curiam quam antea.* And thus albeit His Majesty grant commission to a Sheriff, yet he oftimes appoints other Deputs, as *Mr. William Wallace* in *Edinburgh*, *Sir Gilbert Stewart* in the Sherifdom of *Perth*. And it was found, that though a Prelat had appointed an heretable Bailiff, yet he was not thereby excluded from sitting himself, although he was thereby excluded from appointing any other heretable Bailiff; as is observed by *Had. 1. February 1610.*

IV. Jurisdiction is said to be prorogat, when a defender does willingly submit to the judicature before which he is cited, though otherwise not altogether competent, & *affirmare judicium*, is to submit to a Judicatory altogether incompetent.

It is a received conclusion amongst Lawyers, that a Delinquent may prorogat his Jurisdiction: who has a Criminal Jurisdiction, but that by an Act of his, as by compearance, and answering before an incompetent Judge, the Delinquent cannot prorogat that Judges Jurisdiction, who has no Criminal Jurisdiction at all, *Clar. quest. 42.* And thus if a man were pursued for Theft before the Commissars, their Decreet would be null, though the Delinquent declined not the Court, but if before a Sheriff, the sentence would be valid, tho' the delinquent were not of his Territory; and though he were pursued for a Crime to which the Sheriff were not otherwise Judge competent; but a privat delinquent, by prorogating the Judges Jurisdiction, as said is, can only prejudice himself by his own compliance, but cannot prejudice any other Judge of his casualty.



# TITLE VII.

## Of the Judge Competent, *de foro competenti.*

1. In what place may a Delinquent be tryed.
2. Who is Judge competent, to Crimes committed by Strangers.
3. Where are Vagabonds to be pursued.
4. Who is Judge competent to Eastlefishick persons.
5. Prevention amongst Judges competent, explain'd and cleared.

**F**OR understanding who is Judge competent in general, to punish crimes, and what founds his competency; or as the Civil Law & Doctors speak, *quod est forum competent;* it is fit to know, that he who commits a Crime may be judg'd either in the place where the Crime was committed, which they call, *forum delicti commissi*, or in the place where he was born, which is called *forum originis*, or in the place where he dwells, which is *forum domicilii*.

The place where the fault was committed, is of all the three the most competent, for it is most just and fit, that Crimes should be punished where they were committed, that others who have seen the Crime, may by that punishment be deterred from committing the like; and that the parties injured may be somewhat repair'd, by seeing the Law justly revenge their wrongs; and in the place where the Crime was committed, actors can most easily attend and probation can be soonest and best heard.

Not only vvhhere the Crime it self vvas fully committed, may it be tryed, but vvhhere any part of it vvas committed; and therefore a Thief may be judg'd, not only vvhwhere he first broke the House, but by the Judge of that place vvhwhere he vvas taken vvith the thing stolen. *Capitulum de iudiciis.* *art. 236.* But the Judge of the place vvhwhere he vvas taken, can only proceed against the Thief in that case, if he be present, but cannot cite him if he be absent: vvhwhereas the Judge of the place vvhwhere the House vvas broke, may cite him though he be absent: and if the Judge of the place where the House was broke, or the thing was first stolen, pleases, he may require the other to remit him, or lend him back to him to be judg'd. But this last vould not hold in our practice: For vvith us, vvhwherever a Thief is taken vvith a thing, he may be hang'd; nor is that Judge oblig'd to send him back, except either in the case of prevention, or repledgiation.

There are some Crimes vvich may be committed in several places, and yet be the same Crime, as being begun in one place, and perfected in another; and for knowing vvho is Judge competent, for trying those Crimes I think vve may thus distinguish, vvither the Crime is begun in one place, and perfected in another, both in respect of him who commits the Crime, and of him against vvhom it is committed; as if one should wound a man in one Territory, and should follow and Kill him in another, or take away a woman in one Territory, and deflower her in another; in vvich cases the Judges of either Territory are competent, but so that there is place for prevention, for

the scandal is committed in both places, and the peace of both is injured. The other case is, when the crime is begun in one place, and perfected in another, ~~only in respect of the committer~~, as if a man in one Territory should stand and shoot one in another; in which case, the Judges of both Territories are competent, *l. 1. c. ubi de crim.* or the crime is begun in one, and perfected in another place, as if a man should in one place, give order that the crime should be committed in another place, or should ratifie in one place, what was committed in another place; and in that case, *Clar. Bartol.* and others, are of opinion, that the Crime should be tryed only in the place where the Crime was consummat, because it is not the giving of the mandat, or order to commit the Crime, but it is the commission of the Crime which infers the guilt; But I crave leave to differ from them, and to think that other Judge is competent, and that because oft-times the giving of a mandat, or order to commit a Crime, is of it self a Crime; and because he vvho gave the order, having offended the Jurisdiction vvhere he lived, he ought there to be punished, and the Crime committed in the other place, not being his ovvn who gave the order, but because of the order: it must therefore be drawn back to the order, and so he ought to be punished in the place where he gave the order, which should the rather hold with us, that the giving order is *act and part*, and so is in our Law punishable in the same way, as the principal Crime.

If any man commit a Crime, in the confines of two severall Jurisdiccions, or Territories, he may be punished in either, though some Lawyers are so subtile, as to conclude, that if a man be murdered in the confines of two Jurisdiccions, the murder ought to be tryed in that Jurisdiction, within which the head of the murdered man fell; but if the committer of the Crime dwell also in either of the Territories, or if the Judge of either of the Territories be founded upon any other ground of competency, then that Judge who is so founded doubly, ought to be preferred, *quia duo vincula magis stringunt. Decian. tract. crim. lib. 4. cap. 17.*

So well founded is the Judge of the place, where the Crime was committed, as to his competency, that some *English* Souldiers having in *Anno 1662* killed a man in *Edinburgh*, the Justices here were found Judges competent, though it was alledged that, they being Souldiers, could only be tryed by a Council of War; and being *English* Souldiers under *English* pay, and a part of the *English* Army, they could only be tryed in *England*, all which was repelled, because the Crime was committed here; and it was strange why any of the *English* did think this hard, since they had execute Queen *Mary* though a Queen: and the Bishop of *Ross*, though an Ambassadour, for alledged Treasons committed in *England*.

The reason why the Judges of that place where the delinquent dwells, is Judge competent to the tryal of the Crime, is, because it is fit that the Judge purge his own Land, and Territory, of evil doers and malefactors, lest they affect others by their example, or fall themselves to commit the like Crimes there also; and the reason why he who is Judge of the place where the malefactor was born, is Judge competent, is because the malefactor may and will probably return to the place of his Nativity, & it is most reasonable that a man may be Judged as to his life, where he first received life, and Judges ought to consider the life and conversation of the delinquent, which none can do so well, as *juxta domicilii*: And therefore these two, *domicilii* & *originis*, are still equiparated in the Law, and what founds the Jurisdiction of the one, founds oft-times the Jurisdiction of the other, and their joynt competency may be understood by these conclusions.

First,

First, the Judge of the place where a man dwells, or was born, may beyond all controverſie, proceed to take tryal of the Crime committed within their own Territory, if the perſon be found within the Territory. 2. If he be not found, ſome think they can proceed if the Crime was not committed in their own Territory, but others do more juſtly diſtinguiſh, thus, that either he is purſued by way of accuſation, at the inſtance of a privat party, and then *judex domicilii*, is competent, but that neither of theſe Judges can proceed to enquire into a Crime committed without their own Territory; and though the firſt part of this diſtinction be very juſt, becauſe an accuſer has always election where to purſue, yet the laſt part of it may be juſtly controverted, for theſe reaſons. 1. Becauſe every Judge ſhould endeavour to cleanſe his own Land of Malefactors who dwell there, and who may either infect his people, or commit the like crimes, as was ſaid formerly. 2. It would encourage the committers of Crimes, if they might go out of their own Territories, and commit Crimes elſe where, and could not be puniſhed upon their return by the Magiſtrat where they live, whereas it is probable, that the poor party injured could not follow them to a place ſo far diſtant. 3. We ſee that fathers do, and are obliged to puniſh their children for faults done by them, even without their own family: And a Judge is in Law inſtead of a father to his own people, and ſhould endeavour that they keep themſelves free of all guilt. 4. *Per. l. 1. C. ubi de crim. dicitur quaſtiones poſſe inſtitui apud Judicem loci ubi ipſa commiſſa ſunt, aut loci ubi reus adeſt.*

And with us, Criminal purſuits are ſuſtained at the inſtance of the Procurator Fiscal of the Territory where a man dwells, for Crimes committed without the Territory, though no privat party inform.

I find likeviſe that *Calderas* does diſtinguiſh thus, if (ſayes he) both the place vvhhere the Crime vvas committed, and the place vvhhere the delinquent dyvells, be under the ſame Prince, though the Jurisdiction be under different privat Judges, and the privat Territories be different; Yet the Judge of that place vvhhere the delinquent dyvells, may proceed to try a Crime committed vvitheout his own Territory, though the party injured do not inſiſt.

Againſt vvhich diſtinction, though it be more plaufible than the other diſtinction, yet the former argument do likeviſe conclude.

The third concluſion is, that the Judges of the place where the Malefactor dwells, may proceed againſt him not only if they find him preſent, but though he be abſent, *l. 1. C. authent. qua in provincia C. ubi de crim.* and by the cuſtomes of Caſtil. and Naples, *Carley. num. 747.* and thus the Lords ſuſtained an improbation againſt *Burgh-tonn* in July 1672. though the deed forged concerned an *Iriſh* Estate, and though *Burgh-tonn* dwelt then in *Ireland*, though he vvas cited in *Scotland*.

III. Vagabonds may be puniſhed where ever they are apprehended, for having no certain domicile, every place is in *ipſorum præjudicium* allowed to be their domicile, *Boſſ. de foro compet. num. 69.* and he is ſaid to be a vagabond, who has no certain dwelling, *licet habeat domicilium originis*, theſe our Laws calls Duſtiſoots; and ſuch are our Egyptians, ſturdy Beggars, who though they may pretend to have a dwelling, to which they may ſometime retire, yet ſince ordinarily they uſe to wander, and do things unlawfull, they ought to have no benefit by that domicile.

IV. By the Canon Law, and in all the Romiſh Church, an Eccleſiaſtick perſon cannot be in the firſt inſtance judged by the ſecular Judge; but though this ſubject might afford matter of curious inquiry, yet I will not dip into it ſince the Parliament did in Anno 1661. find that Mr. *James Gubbery* might be tryed by the Parliament in the firſt inſtance, for words ſpoken by him in Pulpit, and as a miniſter; albeit he alledged that this Doctrine ſhould have been tryed, firſt by a Church Judicature, for the Parliament thought this might give



too great liberty to Ministers, and might encourage them by adhering to one another, to enveigh against, and disturb the Civil Government at their pleasure. For if Ecclesiastick persons could not be Judged by the secular power, till first the Church Judicatures did consider the Doctrine; then if these Church Judicatures did approve the Doctrine, it could not thereafter be found Treason, or any other Crime.

V. Where many Judges are competent, they may prevent one another, and prevention is defyned to be *anticipatio sive praecipatio usus jurisdictionis alicujus judicis circa causam aliquam, antequam alius iudex circa eam jurisdictione utatur*, Prevention is, when one Judge interpoles his authority, or when a tryal is entered upon by one Judge, before another Judge do exerce any action of Jurisdiction about that subject.

Prevention may be made, either by the Judge, or by the Party. And prevention is not inferred by raising of a Libel without citation, *Decian. lib. 4. cap. 21.* but it is inferred by a citation, or by the first citation in writ, where moe citations are requisite and by apprehending the Malefactor, because, as *Carleval. de judiciis, num. 881.* observes, deeds are stronger preventions than word or writ. Prevention is likewise inferred by the receiving of witnesses in order to an inquisition, *ibid.*

It seems that the allowed and stated deeds, from which prevention is inferred by our Law, are only these which are enumerated by the 29. *AE. 11. Parl. K. J. 6. viz.* apprehending of the offenders person, and executing a Summonds against him, to underly the Law, and therefore no mention being there made of receiving of witnesses, or inquisition, it appears that these are not sufficient to infer prevention in our Law.

In the competition of thir preventions, when one Judge has done one deed, and another Judge has done another, the ordinary conclusions for preference are, 1. That when one Judge uses first real citations, that is to say, apprehends the offender, and the other a verbal, or citation by writ, the real is preferred. 2. When the one does at the same time use a real, by capture, and the other a written citation, he who has taken the Malefactor is preferred. 3. Where the one has first used the citation, and the other has apprehended the Delinquent, though many Lawyers do prefer the Judge who apprehended, yet the Judge who first cited, will be preferred in our Law: and if a citation be a way of prevention, as was said formerly, I see not why the *ius quaesitum*, by that prevention, can be thereafter taken away: for though it may be pretended, that Judges would be thus encouraged to take Malefactors, which is a greater benefit, than the citing them is; Yet I think it is the duty of all Judges, to concur to take Malefactors, though cited by other Judges, and yet by the foresaid Statute, the Judge who apprehends the Malefactor, before the other cite him, does prevent the citer.

It is agreed to by the Doctors, that vvhhen tyvo competent Judges do both proceed to a Tryal, & both are equally founded in their Jurisdiction and Diligence, that then he vvho pursues for the greatest Crime, ought first, to proceed in his Tryal, because the Common-vvealth is more concerned to have a great Crime punished, than a smal Crime, vvvhich they extend not only vvhere the Crimes are different, but even vvhere the one is aggravated by more atrocious Circumstances than the other; as if the one should pursue for Wounding, and the other for Wounding in the Night, or in an Ambush, *Bofs. bos tit. num. 102.* And he vvho prevents by citing one of many Complices, doth prevent quoad all. As also he vvho once cites him vvho gave Order to commit a Crime, doth likewise prevent all Judges, quoad the Committer. Because it is fit that the cognition of the Crime be not divided, and ordinarily the Defences are common Defences, *Bofs. num. 109.* But I think this Conclusion

clusion should not hold, except the other Judge be presently ready to pursue, for it is the Interest of the Common-Wealth, that Crimes be speedily punished.

Though a Judge competent have once fixed his Process by Prevention, yet if thereafter he be *in mora*, the other Judge, who has a cumulative Jurisdiction with him, may proceed; for thereby it appears, that by Prevention he has designed to exclude the other Judge, meerly in collusion with the Delinquent, *Nov. 9. 1672. Scot contra Kildel.*

If Prevention be not proponed either by the Party, or the Judge, the Process and Sentence will be valid, though led before the Judge that was prevented.

When Judges ought to remit Delinquents to others who are more competent is fully set down, *Title Regalities.*

## TITLE III.

### Jurisdiction of the Parliament in Crimes.

- 1 The Parliament are Judges competent to the Tryal of Crimes, even where the Pannel is absent.
- 2 Forfeitures in Parliament cannot be quarrelled before any inferior Judge.
- 3 Whether Decrees pronounced by Commissioners of Parliament can be quarrelled by any inferior Judicatory.

I. **S**INCE the Parliament is the Supream Judicatory, it may certainly cognosce all Causes, in the first Instance. And of old, if a person accused for Treason did absent himself, the Criminal Court, nor no other inferior Court, could proceed to take Tryal by Probation against him, and so all they could do, was only to denounce him Fugitive for his absence, upon which Denunciation his Escheat did only fall, but he could not be Forefeited; and therefore since it was unjust that he should by his own absence procure to himself an Impunity and Exemption from Forefeiture, the Parliament did by their supream Power cite the person guilty, to appear before them, and did lead Probation in absence against him, and forefeit him in absence, though guilty. But it being found inconvenient that Parliaments behaved either to be called, or such Delinquents pass unpunished, therefore by the 11. *Act. 2. Parl. Ch. 1.* It is statuted, that the Justices may proceed to try Crimes by Probation, even when the person cited is absent; *in cases of treasonable rising in Arms, and open and manifest Rebellion against his Majesty, or his Successors and their Authority:* So that the Parliament are yet only Judges to the tryal of all Crimes by Probation against Absents, except only Perduellion, or open and manifest Treason. And albeit it may seem strange that the Justices should have been allowed to lead Probation against Absents, in this which is the greatest of Crimes, and not in Crimes of lesser Importance; yet this proceeded from the just detestation which the Parliament had of this Crime, and that the punishment thereof might not be delayed, where the Delay might prove so dangerous.

II. If the Parliament forfeit any person after Cognition of the Cause, their Sentence cannot be quarrelled by any inferior Judge, *Act. 39. Parl. 11. K. 7. 6.* And though it be added to that Act, that no Forefeiture lawfully and orderly led in Parliament shall be quarrelled by any Inferior Judicatory; for these Words, *Lawfully and orderly led*, seem unnecessary, since after Cognition of the Cause by the Parliament, no Inferior Judicatory can quarrel a Decree of Parliament, even though it be pretended that the said Decree was not lawful and orderly: yet if a person be only denounced Fugitive by the Parliament, the Lords of the Session may suspend in that case, if the Process was not orderly led; but whether they can reduce, even in that case, *est altioris indagationis*. And some think, that though it were very inconvenient that such a Decree should receive present Execution, where possibly the Party was not lawfully cited, yet that such respect is to be payed to the Parliament, as that the illegality of that Procedure before them, though not objected before Sentence, should remain undecided till the next Session of Parliament.

III. If the Parliament should remit any such Process for Crimes, to any of their own Number, to be decided finally before them, it hath been doubted whether their Decisions could be reduced by the Session: And this Act of Parliament reaches only to Decisions in Parliament. But yet since Decrees pronounced by Commissioners of Parliament, are reputed with us Decrees of Parliament, and since Decrees pronounced by Commissioners, for Valuation of Teinds, are not reduceable, because these Decrees are reputed Decrees of Parliament, as being pronounced by such Commissioners of Parliament; it seems that Decrees pronounced by such Commissioners, in Crimes, after Probation, could not be quarrelled and reduced by the Session, or other inferior Judicatories.

## TITLE IV.

### The Jurisdiction of the High-Constable in Criminals.

- 1 *The Original of the Word Constable, and his Power.*
- 2 *The Office of petty Constables.*
- 3 *The Jurisdiction of those who are Constables of his Majesties Castles.*

I. **S**OME describe the Word *Constable*, from the Word *Coning*, which signifies a King; and *Staple*, which signifies a *Stay* or *Hold* in the Saxon Language, because Constables were only erected in those places where the King kept House; and thus the Constable was Judge of old, to all Crimes committed within twelve Leagues of the Kings House, and Habitation, *l. Malcol. c. 6.* Though *Skeen* there observes, that the best Manuscripts bear only two Leagues, or four Scots Miles. Our *Craig* and other Authors, derive the Word *Constable*, from the *Comes stabuli*, under the Roman Empire, *nam Constabularius* (says he) *nihil aliud est nisi praefectus Equitum*: Since the Reign of King Robert the Bruce, this Office of High-Constable, stands heretablie in the Noble Family of Errol: and there being some Debates concerning his Jurisdiction, Francis Earl of Errol, obtained Commission under the Great



great Seal, dated the 23. of *Jun* 1630. Seal'd *penult.* *March* 1631. to the Persons therein specified, or any nine of them, empowering them to search the Acts of Parliament, *consuetude*, Monuments and Registers of the Kingdom, and all Evidents that the Earl of *Errol*, or the Lord *Hay* his Son, should produce concerning their Honours, Hostilities, Priviledges, and Immunities belonging, or which had belonged to the Office of Constabulary, from the first institution thereof: This Commission I have seen, with the report thereof dated the 27. of *July* 1631. bearing the Commissioners to have met with the Earl of *Errol*, and his said Son, and to have considered their Instructions, Warrants, and Customes of other Countreys, about the Constables Priviledges; and in the third Article of the Report (which relates to the Criminal Jurisdiction only here treated of) they set down these words, *The Constable is Supreme in all matters of Riot, Disorder, Blood, and Slaughter committed within four Myles of the Kings person, or of the Parliament, or Council representing the Royal Authority in his absence. and that as well within the Court, as outwith the same.* And the tryal and punishment of such Crimes and offences, is proper and due to the Constable and his Deputs, and the Provost and Bailies of that Centre or Burgh, and all other Judges within the bounds, where the said facts are committed, are obliged to ride, concur, fortifie and assist the Constable and his Deputs, in taking the saids Malefactors, and to make their Tolbooth patent for receiving them therein. As was clearly evident, by production of Warrants granted by his Majesties Predecessors to that effect: and which likewise appeared by the Exhibition of certain Bonds made by the Town of *Edinburgh* to the Constable, for the time, concerning that purpose, the King having seen this report, did approve it in a Letter directed to His Secret Council of this Kingdom, from the Court at *Theobals*, the 11. of *May* 1633. Registrat in the Books of Secret Council, the 15. day of that Moneth: and in the Commission, Report and Letter foresaid, the Constable is designed High-constable, and his Office the High-Office of Constabulary.

The Constable is still in use since that time, to judge Riots within the bounds foresaid, and to interrupt the Town of *Edinburgh*, when he knows of their meddling, providing the Riots be committed in time of Parliament: and I was told, that in time of Parliament holden at *Edinburgh*. Anno 1640. and 1641. the Earl of *Errol* was found by the Lords of Secret Council, to have the sole criminal Jurisdiction, and did repledge servant to Sir  
*Thomas Nicolson*, the Kings Advocate, arraigned before the Magistrats of *Edinburgh* for a Slaughter, and assilzied him upon production of a remission. And upon the 5. of *September* 1672. *Gilbert* Earl of *Errol*, did repledge *James Johnston* Violer, arraigned before the Magistrats of *Edinburgh* (as Sheriffs within themselves) for stabbing of his Wife the day before *Easter*, the Magistrats had taken his judicial confession, and summoned the Assize: there was no formal repledgiation, because the Magistrats passed from him upon the Constables application; and upon the 6. of that Moneth of *September* the Constables Deputs sentenced him to be hang'd, and to have his right hand which gave the stroak, cut off, and affixed upon *Leith* wind Port, and ordained the Magistrats of *Edinburgh* to cause put the sentence to execution upon the 9. of that Moneth.

Likeas, the Coach-man of a Noble-man, having about the same time wounded a Child, the Constable commanded the Towns Guards to apprehend the Delinquent, which they accordingly did, till he was freed by a Remission.

II. Out of this high Magistracy of Constable (sayes *Lambert* an *English* Lawyer) were drawn these inferiour Constables of hundreds, which Office we borrowed from them, and they are with us subservient to the Justices of Peace,

and are to be chosen by them two out of every Paroch, and as many in Towns as may be proportional to the greatnesse thereof; and they have power to apprehend all suspicious, idle, or guilty persons, and may require the neighbours to assist them; and if the guilty persons flee, they may require the master of the house to make open doors: all which, with many other particulars are entrusted to them, by the 38. *Act. 1. Par. Ch.* the 2.

III. His Majesties Predecessors used of old, to build Castles in the considerable Towns of the Kingdom, and for preserving the Peace both in that Town, and in the adjacent Countrey; and the Governours of those Castles were called *Constables*, though they were more properly *Castellains*, or *Chastellains*, as the *English* Lawyers observe, these had the power of riding the Fairs, and having had the Keys of the Tolbooth delivered to them, they exercised a criminal Jurisdiction, during those Fairs: but it was found, that this Jurisdiction did not extend to Fairs that were granted posterior to the Office of Constabularly, nor to the customes thereof, as was found the 18. of *July* 1676. betwixt the Earle of *Kinghorn*, and the Town of *Forfar*; but these Offices depend absolutely upon prescription, use, or custom, which either extinguisheth, or limits them most variously: but because those Constables use to extort customes at those Fairs, it is therefore appointed by the 60. and 61. *Act. 13. Par. Ja.* 2. that the Constable shall not exact any such customes, *except his Feftment bear him thereto, and that old use and custome shall not be sufficient*: Which Acts are ratified, by the 33. *Act. 5. Parl. Ja.* 3. But if the Infestment in the general bear, *cum feudis & devoriis*, &c. Possession by vertue of that general Right, will be found sufficient, though the particular Casualties be not exprest in the Infestment, as was found in the former case, betwixt the Earle of *Kinghorn* and the Town of *Forfar*,

This Officer was amongst the *Athenians*, called *τῶν ἀρχόντων*.

## TITLE V.

### The Jurisdiction competent to the High-Chamberlain, and Magistrates of Burghs Royal.

THE Chamberlain was an Office to whom belonged the judging of all Crimes committed within Burgh, and he was in effect Justice-general over the Borrows, and was to hold Chamberlain-Airs every year for that effect; the Form whereof is set down in *Reg. Maj.* in a Book entituled the *Chamberlain-Air*, *Iter Camerarii*, he was a supream Judge, nor could his Decrees be questioned by any inferior Judicatory, *Iter Cam. cap. 35.* And his Sentences were to be put to Execution by Bailiffs of Burghs, *ibid. cap. 37.* he made the Prices of all Victual within Burgh, *cap. 33.* and of these who wrought in the Mint-house. *Statute Da. 2. cap. 38.*

He is called *Camerarius à Camera*, (*id est, testudine sive fornice*,) *quia custodit pecunias quæ in Cameris præcipue reservantur.*

This Office belonged heretably to the Duke of *Lennox*, but its Priviledges are

are by his absence run in default: Magistrates of Burghs, as such, have no Jurisdiction but what is competent by their Charter of Erection, wherein ordinarily they have Power of Pit and Gallows; but sometimes they are Justices within themselves, as *Edinburgh*, who have right also to all Escheats of their own Burgeses, or other Criminals judged by them, for Crimes committed within their own Burgh: Sometimes they are Sheriffs within themselves, and ordinarily they are Justices of Peace within their own Jurisdiction.

The King may erect a Burgh Royal within the Bounds of another Jurisdiction, as of a Regality; but in that case, though the Lord of Regality consent to the Erection, yet it will not prejudice the Baillie of Regality, whose Right of Bailliary was constitute, prior to the Erection of the Casualties, that were formerly due to him: albeit it was alledged that the Lord of Regality might dissolve, and dismember that part from the Regality, without the Baillies consent; and so it not being in the Regality, it could not be subject to the Bailliary, the 27. of *February* 1666. Lord *Colvil* contra the Town of *Culross*.

## TITLE VI.

### The Jurisdiction of His Majesties Privy Council in Criminals.

- 1 *In what consists the Jurisdiction of the Council, their President and Number.*
- 2 *Their Procedure in punishing Ryots.*
- 3 *Whether a Power to eject, be a sufficient Defence against a Ryot.*
- 4 *The punishment of Ryots.*
- 5 *Precognitions fully considered.*
- 6 *The Council name Assessors to the Justices, and sometime review their Sentences.*
- 7 *They grant Letters of Intercommuning, and Commissions for Fire and Sword.*
- 8 *They sometimes ordain Houses to be delivered, under pain of Treason.*

I. **T**HE Affairs of this, as of all other Nations, are either such as concern the Policy of the Kingdom in general, or such as respect the distributing of Justice betwixt privat Parties; the Policy or Government of the Kingdom is regulated by His Majesties Privy Council, in which the Chancellor is President, if he be present, but in his absence, the President of the Council preceeds. This Office of President of the Council is a distinct employment, and it gives him the precedency from all the Nobility. The Number of this Judicature is not definit, depending upon his Majesties Commission, but all the Officers of State are Members of it, *ratione officii*, it has its own Signet, & its Letters pass by a Bill, subscribed by any one of the Council: Upon which Warrant, the Letters are in their several Forms, extended & subscribed by the Clerk of the Council, and they bear also to be, *ex deliberatione Dominorum Secreti Concilii*, they must be execute, at least upon six free days, and a full Copy must be given, because all Dyets here are peremptor,



and not with Continuation of days; the reason whereof, is, *ut reus veniat instructus ad defendendum*, whereas before the Session, a short Copy is sufficient, because the Summons is given out to see, and a time allowed to answer: The Dyets are here so peremptory, that if the Defender be cited to a day, whereupon the Council sits not, if he appear at the day, to which he is cited, and take Instruments at the Council Chamber, he will not be thereafter obliged to attend, nor can he be denounced Fugitive for being absent; for seeing it is peremptory against him, it is reasonable that it should be peremptory for him.

Where many Parties are cited as Defenders, upon a Bill to the Council, any one or two will be allowed to answer for the rest, they finding Caution, and engaging themselves to be lyable for whatsoever shall be decreed against those, for whom they undertake; which Priviledge is granted if no personal punishment be concluded against the Defenders; but if either the Complaint conclude, or that the Crime will in Law infer a corporal punishment; then the offering to find Caution to answer, will not be allowed, *nam noxa caput sequi debet*, and no man can bind his Body for another, *nam nemo est Dominus suorum membrorum*, the Pursuer may appear by his Procurator; but the Defender must either be present, or send a Testificat of his Sicknes, upon Soul and Conscience: And yet it is the Priviledge of any Counsellor, that he may undertake to answer for any Defender that is cited, *quo casu*, the Defender will not be unlawed, or denounced Fugitive upon his absence, but his Defences will be received, as if he were present; nor can any Bill for receiving a Complaint, pass against a Counsellor, but *in presentia*.

The Council by the first Constitution, were only to take cognizance of what concerned the publick Peace, and were neither Judges in civil cases, nor Crimes, but in so far as these impinged upon, or were Violations thereof: but now that Judicature doth under the Notion of Ryots, and Breaches of the publick Peace, hear too many Causes Civil and Criminal. But seeing the design of this Treatise, aimes only to illustrate our criminal Law, I shall only consider the procedure of the Council, in so far as they can cognosce upon Crimes.

II. The most ordinar crimes which are punished by the Council, are these, which we call Riots in our Law. A Riot is a Breach of the Peace, committed by Oppression, or wronging his Majesties Lieges, by Force and Violence; instances whereof, are the dispossessing any of his Majesties Subjects, by a Convocation of the Lieges, or otherwise; the affronting of Magistrates, by railing Tumults against them, &c.

For the better understanding of which Crime, it will be fit to consider, that *jura maxime oderunt violentias & rapinas & pluribus modis succurrunt vim passis & spoliatis*, for here the publick is wounded, in breaking its Peace, and privat persons are wronged, by the prejudice done. Upon which Account, the Law hath furnisht more Remedies against this than any other Crime; for either it may be pursued civilly, *per interdictum unde vi*, so called from the first words of the Edict, which runs thus, *unde vi tu illum deiecasti restituere cogam*, which interdict, restored only the Possession of Immoveables; whereas Moveables being spoilized, were craved back, *actione vi bonorum*. Justinian, also introduced, that he who rest, and violently took what was his own, should lose it, *l. 7. C. unde vi*, for in this the Resumer usurps the Power of the Magistrat, whose Ministry is requisit, in inverting the present Possession; The Canon Law likewise hath introduced, *beneficium, cap. redintegranda. 4. cap. 3. quest. 1.* and Menoch relates 17. Remedies, and Philip. Franc. 24. for Recovery of Possession; and seeing the thing posselt, is still presumed to belong to Possessor; and that hardly the Right of Moveables can be otherwise proved, than by Possession: the Law did most reasonably, both for securing Property

perty, and punishing Violence, establish that great Rule, that *Spoliatus est ante omnia restituendus*, and conform thereto, the Council (who are never Judges to Property, but only to Possession, so that in effect, all their Sentences, are Interdicts) do still restore the possession to the person ejected; and likewise punish arbitrarily the Violence committed, for we have no express Statute taxing the punishment. By the Law of England it is accounted no Riot, or Routs except three at least were present, and that something was done, *ad terrorum populi*, for breaking of the Peace, *Bolton. cap. 31.*

III. The two ordinar Defences, which are propon'd against riotous Ejections, are, that by a Writ it was lawful, and agreed upon betwixt Parties, that the Defender might have ejected the Pursuer, if he removed not at the day appointed, which will defend against a Riot: and yet *Craig* relates a Case, 198. where one who had granted a Tack only for a year, having ejected the Tacksman, after the expiring of that year, was pursued, *actione unde vi*, in an Action of Ejection, and was forced to transact, albeit he contended, that the word (only) was exclusive of any future possession; but where by express Paction, it is declared lawful for him who enters, to enter *brevi manu*, without Process, or hazard of Ejection; it would appear, that this Paction is unlawful, seeing no man can warrant Violence, and this seems as unlawful, as if one should oblige himself, never to pursue for any Injury to be done him: Which Paction, the Law declares expressly unlawful, & *nemo potest renunciare juri publica*, and this were to allow privat persons the power of Jurisdiction: Nor can it be thought, but this Paction was extorted; and albeit the Party injured, were excluded by this Paction, yet his Majesties Advocat may certainly pursue, *vindictam publicam*, if Opposition was made, and Violence used: Notwithstanding of which, I remember that the Earl of Argyle having obtained a Decreet of Removing against *George Campbell*, and it being suspended till the next Term, the Lords ordained it to be insert in the Bill, that the Earl might eject him, *brevi manu*, the next day after the Term, by his own Authority; but the Earl was Sheriff here himself, and so his Jurisdiction was only prorogat, and the Law is express, that *privatus potest ex consensu prorogare jurisdictionem ejus qui aliqualem habet, sed non potest privatus consensus tribuere jurisdictionem ei qui nullam habet Vid. hanc questionem, apud Bart. ad l. creditores, C. de pign. & hypoth.* But here also, the Lords Warrant to eject, was a delegating of their own Jurisdiction.

I conceive also, that where there is no Violence, nor Opposition made, the voluntar consent may allow the Ejection, especially in a Master towards his own Tennent, who hath a natural Jurisdiction in that case; and that his Ejection is also allowable, if the Tennent after Compt, oblige himself to remove, and declare that it shall be lawful to his Master to enter, *brevi manu*, if he pay not what is declared to be due; for there the preceeding Compt is equivalent to a Declarator, and the Party ejected is not prejudg'd otherwise than by his own not payment: And therefore the Lords, the 19 of December 1661. found not the Countess of Murray lyable to a spoilzie, for ejecting *Dewer* her Tennent, because *Dewer* had by a Compt declared that he was Debitor in such a sum, and by a Bond obliged himself to remove betwixt and a particular day, and if he fail'd, declared it should be lawful for the Countess to enter, *brevi manu*, to the possession. By the Civil Law, he who violently intronnetted, even with what was his own, lost thereby his Property in it.

The next defence is, that the pursuer had immediatly before, possesst himself violently, and it was lawful for the Defender, to recover his possession, *ex incontinenti, nam vim vi licet repellere*, and the Law sustains this defence, l. 2. §. 9. & l. 17. ff. eod. and explains that to be *ex incontinenti factum quod factum est priusquam ad aliud negotium fuerit recessum*, what time should be allowed

for repelling violence, is arbitrary to the Judge ; for violence committed by a great man, requires more time for reparations to redress it, than when it is committed by a privat person, for friends must be convocat, and arms prepared, as *Bart.* and the *Glof.* instances upon the former Law ; But in personal injuries *id tantum dicitur ex incontinenti fieri quod fit in ipso flagranti crimine.*

IV. The violent Ejection of his *Majesties* Liedges, out of their possession, is pursued, either by an action meere civil, which in moveables is called spoilzie in Lands Ejection ( which the Civil Law terms still, *dejectio & non ejectio* ) or criminally as a Riot. vvhich is a mixt Action, partly Civil, partly Criminal. When spoilzies or ejections are civilly pursued, the conclusion is violent profits ( which is the double Rent of the Lands, and restitution of the thing craved ) : But when this is pursued as a Riot, the punishment is arbitrary, as is also the criminal punishment. The Civil Action prescribes in three years, *K. Ja. 6. Parl. 6. cap. 8.* But the Action of Riot or Criminal Action prescribes not ; and yet it may be doubted, if these Actions prescribe not, *quoad* the conclusion of Restitution, seing that is a civil conclusion ; and it may be debated, that the maxim, *spoliatus ante omnia est restituendus* loses its vigor after that time, so that one pursued for a ryotous ejection, or spoilzie, may alledge that no Ryot can be concluded, seing the thing or Land controverted was his own. We shall speak of the Criminal pursuite in its own place.

Whether the one of these actions doth exclude the pursuer from all other reparations, so that he who pursues the Action of spoilzie, or Ejection, cannot thereafter pursue a Riot, or a Criminal pursuit, may be controverted ; and the Civil Law decides it thus, that *quando & una & altera tendunt ad vindictam tunc una agitur ad vindictam altera vero ad prosecutionem rei familiaris* : and thus the having obtained a Decreet of ejection, impedes not the pursuer to intent an action or Criminal pursuit ; but after a Decreet obtained for the ryot, a Criminal pursuit cannot be intended, for these *respiciunt vindictam.*

V. The Council cognosces likewise upon Crimes by way of precognition, which they do in two cases, 1. Where considerable persons are interestd in the Crimes committed, as noble men, or Clanns, where there is a hazard of alimenter the feuds, by remitting the Criminals to the ordinary course of Justice : Wherefore to prevent future resentments, and cement old differences, the Council in *quorum tutela est pax publica*, cognosce upon the Crime, and remit much of their ordinary rigor.

The 2. case is, when the Crime is so circumstantiat, that it requires *transigere* and lessening of the ordinary punishment : The formes in precognitions are, that either the friends of the parties give in a Bill to the Council ( which cannot be granted but in *presentia* ) deducing the case, and representing what danger is like to ensue, *quo casu*, Letters are direct, ordaining the other party to be cited, and both parties to cite such witnesses, and probation, as they will use, or else if no application be made, the Council ordains Letters to be direct, citing both parties. His Majesty having with consent of Parliament appointed that the Justice-court should be served by many of the Lords of Session, did, because of their number and ability, discharge all precognition in their Commission ; and yet because these precognitions were not discharged in the Commission granted to the Council, the Council did sustain themselves Judges competent to precognitions, their Commission bearing to be as full, and to give them as much power as any former Council had. But really it were happy for this Nation, that we wanted all Precognitions, since thereby the Delinquent has power to chose such dyets as he pleases, and so may pursue his precognition when he knows the witnesses who could prove his guilt are absent, or may prevail with them to absent themselves for some time ; and this is ordinarily practised. Nor have I ever seen any who pursued a precognition



nion brought to condigne punishment; and whereas it is pretended that there are some cases wherein the severity of Law ought to be remitted, upon the considerations of lessening circumstances, wherein equity may be allowed to blunt the edge of Justice. It is answered, that this may be done by the Justices, either upon a special commission for trying the merits of the Pannels preferences, or after that the Justices have heard all that will be legally urged by either party, in a full tryall they may delay the Execution, and make report to His Majesty of the just state of the case.

The Council likewise sometimes inflict punishments without Recognition, by way of citation, as in the case of *Giles Thyr* English man, who being incarcerated as accessory to the death of Mr. *Bedford* in *Leith*, and as guilty of Adultery with *Mistress Hamilton*, wife to the said *Bedford*, *Thyr* did, upon a petition to the Council, wherein he confessed the Adultery, but denied the Murder, (which *Mistress Hamilton* had likewise at her death acquit him of) obtain himself banished, without being put to the knowledge of an Inquest, by whom he had certainly dyed, as guilty of notour Adultery, 1665.

VI. The Council name likewise Assessors to the Justices before the tryal, these the Grecian Lawyers call'd *ἡγεμόνες*; And sometimes they discharge or continue Dyets.

After sentences also, the Council, upon application made to them, do either mitigate the punishment, not only where it is arbitrary, but even where it is statutory, as in the case of *Brown*, whom they ordained only to pay 100. Merks, tho' she was found guilty of notour Adultery, which is death by our Law. Some times they ordain no sentence to follow upon the verdict of an Inquest, as in the case of *Purdy*, who was condemned for Usury, in so far as he had taken Annual rent a moneth before the term of payment, upon his Debtors voluntary offer; And sometimes they ordain some of their own number to revise the process and verdict; Which Assessors do reverse the whole Process, and ordain it to be torn out of the Criminal Registers, as in the case of *George Grahame*, who being pursued for Theft; it was alledged that the Assize had found him guilty of receipt, and so the verdict was found disconform to the Libel, and consequently the whole process was null. Yet when Mr. *William Someruel* was found guilty of Murder, upon the deposition of one witnesse, the Council refused to review the verdict, as unwarrantable; for they found that they could not quarrel an Assize, which condemned, seeing Assizes can only be quarrelled for error when they assize. And when his Advocat cited to them 47. *Ass. Par. 6. K. J. c. 3.* Whereby it is ordered, that where a party finds himself grieved by an Assize, by partial malice, or ignorance, it shall be lawful to him to cite them before the Council, and if the error be proved, the party shall be restored to the condition he was in before the sentence. To this it was answered, that this Act speaks only of Civil cases, and that by the Council here, is meant the Session: To which it was replied, the Rubrick and Act are general, and treats of all persons wronged, & *qui totum dicit nihil excipit*: And the reason of the Law is comprehensive of both.—From all this some do conclude, that if the Justices erre in judging the relevancy, or if the Assize find that proved which was not remitted to them, that in either of these cases the Council may review the sentence, but that they cannot quarrel the sentence, upon the account that the verdict is not sufficiently warranted by the probation.

Sometimes also the Justices are concluded by the Decreet of the Secret Council, which is repeated to the Assize as full probation; So that the Justices have only the execution of their sentence remitted to them, Thus *Fleming* was convicted before the Council, of having uttered most disdainful speeches against the King, and therefore was remitted to the Justices to be exemplarily

nished; and upon production of their Decreet ( which Decreet is still expressed in the ditray ) he was hanged. 17. May 1615.

VII. If the Law cannot receive full execution and obedience, *via ordinaria*, by the Criminal sentence, then the Council upon production of Letters of Horning, following upon any Criminal sentence, and duely execute and Register, use to grant Letters of intercommuning, whereby all His Majesties Liedges are prohibit to intercommune with any of the Rebels so denounced; which Letters must be published at all the mercat crosses of the Shyrs, and Jurisdictions within which such persons reside, whose intercommuning is suspected, and register there: and if need be, the Council will likewise grant a commission for Fire and Sword, to such persons as they will name, against the persons who are disobedient in the criminal Letters, as said is: And ordinarily thir commissions of Fire and Sword are given to the persons interested, which occasions many great abuses. And these commissions are sometimes granted against parties who were never cited, but upon a naked complaint exhibit to the council, which is most irregular.

The Council do sometimes grant commission to bring in parties dead or alive, and that upon naked Petitions, without any previous tryal, as they did against the Laird of *Dinbaith*, upon a Petition, wherein it was represented that he had run a way with the publick money delivered to him by the Shire, for paying their Cesse and Excise; But this seems hard, and it were to execute, a free Subject before he be heard, or sentence pronounced against him: for these privat petitions may be most unwarrantably founded.

VIII. If any person keep out his House in Garrison against his Majesty, the Council first uses to issue out Letters against him, to deliver up his house, under pain of Treason; and they ordain a Herald to go and summond him for that effect, and if he refuse, they ordain him to be proccessed before the Justice-general and do immediatly, before any criminal sentence, grant a Commission of Fire and Sword against him, as in the case of *Burgie*, June, 1668.

They used likewise of old to ordain Noblemen and others, who could not be apprehended by Captions, for civil Debts, to deliver up their persons in any of his Majesties Castles, under the pain of Treason: Which though, it be now in desuetude, yet it was most reasonable, and of excellent use, seeing it is most absurd that any of his Majesties Liedges should contemn his Laws, and that such poor persons as pay his Majesties Taxes and Impositions, and who are obliged to venture their lives for him, should not likewise have the assistance, as vvell as the protection of his Lavvs. So that vvhhen the ordinary remedies of Caption, Compyring and others fail, these and other extraordinary remedies should be allowed, untill his Majesties Lavvs be obeyed, and the party so injured be fully and finally repaired.

## TITLE VII.

## Of the Exchequers Jurisdiction in Criminals.

THE Exchequer are only His Majesties Chamberlains, and have no Jurisdiction in Criminals; and yet they fine, and confiscat such as transgress pecunial Statutes, or wrong his Majesties Rents; *quod casu*, they do in effect judge Crimes: for it is a Crime to abstract Customs, or cheat the Publick; And without this Jurisdiction they could not manage His Majesties Rents; so that this is *jurisdictio emanata*, founded upon that Rule, *quando aliquid conceditur omnia concessa videntur sine quibus hoc explicari nequit*, but it seems, *de jure*, they should not, even *eo casu*, cognosce: for by the 89. *Act. 1. Parl. Ja. 6.* It is statute, that such as commit Fraud, in transporting forbidden Goods, shall be punished at Justice Aiers, at least the Justices also have power.

I remember that in July 1668. the Exchequer did fine a very intelligent Person, for filling up a Blank Signature, subscribed by the King, and ordained to be filled up by the Exchequer: which some thought irregular; for either he had committed a Crime, & *eo casu*, he should have been remitted to the Justices; or if he had committed none, he could not have been fined. And albeit the Exchequer, or any other Court may fine, or imprison such as injure their Jurisdiction, or may ordain Damage and Interest to be repayed to the Party injured, in any thing before their Court; yet no person having here been prejudged, and the injury having gone no further, than a *simplex conatus*, there could be no damage and Interest incurred. But it seems the Exchequer are still Judges, *in criminibus repetundarum, & de residuis*.

The Commissioners of the Thesaury did, in June 1669. Ordain two Skip-pers in Bruntisland, to be scourged at the Mercat-Cross: because when a Customer came to enter a Boat wherein unfree Goods were alledged to be, they did put off the Boat from the Rock where it lay, whereby the Customer fell into the Sea, and had almost drowned.



# TITLE VIII.

## Of the Jurisdiction of the Lords of Session, in Criminals.

- 1 *The Lords of Session use to pass Bills for Criminal Letters.*
- 2 *They Advocat Causes belonging to the Justice Court.*
- 3 *They are Judges, in crimine falsi.*
- 4 *They have made Statutes for regulating the Justice Court.*
- 5 *Whether they can review the Sentences of the Justice Court.*
- 6 *They suspend the Sentences of the Justice Court.*
- 7 *They are Judges to such as kill, or wound one another, during the dependence of a Process before the Session.*
- 8 *They grant Warrant to Advocats, to compare for such as are pursued for Treason.*

I. **T**HE Lords of Session have regularly no Jurisdiction in Criminals; and yet they pass the Bills whereupon all criminal Summons are raised: For all Summons in Criminals must have a Bill, which must pass under the Hand of His Majesties Advocat, and for which he gets ten Merks, and his Servant one, thereafter it is carried to the Ordinar upon the Bills, and is subscribed by him as a common Bill.

The Reason why thir Bills are pass by the Lords, seems to be, because the Justice-deputs were not ordinar Residenters in Town ( their Sallaries not being sufficient for defraying that charge ) or else, because the Clerk of the Bills is a Member and Servant of the Colledge of Justice; yet this was one of the Grievances given in by the Justices to the Parliament, *Anno 1662*. And it is very unreasonable that those whose Imployment it is to understand criminal Cases, should not have the passing of these Bills; and many of the Lords refuse to pass these Bills, whereby the Liedges are prejudged. And it is most unreasonable, that the Justices should not know what they are to judge; especially this Warrant being a part of the Process, and so falls naturally under the Cognition of these who are Judges to it. And it is probable, that if any of the Justices would pass their own Bill, it would sustain. But now the Justices use ordinarily to pass their own Bills: Because the Justices are now of the Session; but still other Lords who are not Justices, may pass such Bills.

But albeit these Lords cannot judge Crimes, yet they may and do punish injuries committed against any of their own Members, by Fining or Confining.

II. They likewise advocat Causes, from the inferior Courts to the Justices: thus in *Anno 1664. Mackintosh*, being pursued before the Sheriff of *Inverness* for Theft-boot, they advocated the Cause to the Justices; albeit it was alledged, that they could not be Judges to the Cognition. To which it was answered, that the Consequence was ill inferred; for the Council did advocat, and could not cognosce; and the Lords of Session did advocat Breives for serving Heirs, and yet they were not Judges themselves; for both in this, and that case, an Inquest was necessar.

III. They are likewise Judges, *in crimine falsi*; and their Sentence is a sufficient Warrant to the Assize to condemn, without repeating the Probation; and when the Inquest refuses to condemn upon that Warrant, they are of new inclosed: as was done in *Binnies* case; and will be lyable to an Assize of Error, if they assilzie; and their Decreet bears the Lords remit him to the Justices, to be punished, *tanquam falsarius*, and to underly the Law criminally, and ordained that Ordinance to be insert in their Books of *Sederunt*. And that Order is in the Justice-Court, called an Act of *Sederunt*, the 2. of July 1662. Albeit the Act of Parliament, J. 6. Parl. II. Requires that all Probation in Criminals should be led in presence of the Assize; yet the answer is, that the Lords Decreet is only Probation here, and that is read in face of the Assize.

The Lords likewise determine the punishment in Falshood, and remit in their Decreet, the Party to the Justice, to be only banisht, or scourged, or have his Tongue boar'd, according to the quality of the Guilt. And I have seen a Gentle-man, whom I will not name; in Anno 1664. only imprisoned by the Lords, for forging of a false Bond of Suspension, because he was ingenuous, and in Necessity. And albeit this may seem irregular, yet seeing the Lords are only privy to the Depositions, it is necessar they should have this Allowance. I find it one of the Rules set down by the Doctors, that *ubicunque judex principaliter cognoscendo reperit incidenter crimen esse commissum, potest de crimine illo cognoscere, C. si adversus liber. l. pen.* And the Example of this Rule is instanced, in *Charta falsa. l. pen. C. de probat.* And upon improving an Instrument, or Writ, they have ordained, *omnes testes instrumentarios, & falsi fabricatores*, to be *falsarios*, and remitted them to the Justices, the 16 of February 1660. *Fern. Innes* and *Tarbat* hang'd. But I remember not that they have in any other case cognosced upon Crimes *incidenter*; albeit the fore-said Rule would give them an incident Jurisdiction in all cases.

IV. I find that the Lords have made Statutes to regulat the Justice Courts, for upon the 1. of June 1593. they declared, that all landed men should be esteemed *paros curia*, and might sit upon Noble-mens Assizes, being pursued, *tanquam temere jurantes sup. assisa*; and the Council uses to consult them in intricat cases, which are referred to them by the Justices. And thus in Anno 1667. they were consulted, whether the West-Country Rebels might be forefaulted in their absence.

V. But whether they be Judges competent to reduce, or review what is done by the Justices, or in the Justice Court, in any case, is not yet decided; but I have seen a Reduction of a Verdict, of an Inquest, pronounced against *Mr. William Somervel*, whereby he was found guilty of Usury. The Reason of Reduction was, that the Inquest had erred, *in calculo*, and it was contended, that the Lords were competent Judges to review errors, *in calculo*, for that was in effect but a civil *Medium*; and where no criminal Conclusion was craved, nor could follow, they were Judges, as in the case of Reductions of Retours, where the Verdict may be reduced, as past upon ignorance.

It was also urged, that seeing the Lords made Statutes to regulat the Justice Courts, and past their Bills, they might cognosce upon palpable Errors, committed ignorantly by Assizes; and it were hard that the Liedges should not be repon'd against Errors of such ignorant persons, as Assizers ordinarily were.

VI. The Lords of Session do suspend the Execution likewise, of all Sentences in the Justice Courts; but these Suspensions, when once raised, are dis-cuss before the Justices.

They likewise sometimes discuss these Suspensions before the Session. And thus an Assithment modified by the Justices, being exorbitant, the Lords by

way of Suspension, did lessen the Sum, the reason of which Decision was, because they found this case to be but of the Nature of Damage and Interest, and not to concern corporal punishment, the 16. of Dec. 1664. *Innes contra Forbes*.

VII. By Act of Parliament 1555. such as Kill, or Wound, to the effusion of Blood, or any other way, one another, during the Dependence of a Criminal Process (which Dependence is declared to continue, from the Execution of the Summons, till the compleat execution of the Decree) that the Pursuer committing the said Crime, shall for ever lose the Cause, and the Defender being guilty, is to be condemned in the Plea. The Pursuer, or Defender, being convicted before any competent Judge in Criminals, without any Probation, except summar Cognition, to be taken by Conviction, or putting the Committer to the Horn, and denouncing him Fugitive. By this Act the the Committer loses his Liferent-Escheat immediately after Denunciation, without being year and day at the Horn; and giving of Counsel, is Art and Part in this Crime.

This Act was to continue only for three Years, and is prorogated for seven Years, by the 138. *Act. Parl.* 8. *Ja.* 6. and is thereafter made perpetual, by the 219. *Act.* 14. *Parl.* *Ja.* 6. I have often seen Processes intended upon this Act before the Lords. But it is necessary, albeit not observ'd, that Cognition be first taken by the Justices, or other Criminal, and competent Judge. Yet without this, Process was sustained by the Lords, *in prima instantia*; but this Defence was not there alledg'd; and Process was sustained, albeit no effusion of Blood followed, the 29. of *July.* 1662. *Harper against Hamilton*; where it was debated, whether the Lords might summarly receive Probation of it themselves, or remit the Tryal to the Justices; for which doubt, I thought there was no great Ground: because by the Act foresaid, the Justice is only Judge, *in prima instantia*. And yet, in *Sleiches* case, 1673. It was found, that no previous Tryal before the Justices was necessary.

The Earl of Niddisdale pursuing the Tennents of *Duncom*, February 1672. they alledged absolutor, because the Earl had beat some of them, who were sent to execute a Summons at their instance against him, at least he had given order to beat them, or ratified the beating of them: To which it was answered, that, 1. The beating some of them could only found an exception to such as were beat; and this the Lords found relevant, though the Summons executed was for a common cause: and so in effect, those who were beat, represented all the pursuers. 2. It was alledged, that order to beat them was only probable, *scripto vel juramento*: for though a Crime ordinarily, in a Criminal Court, be probable, *prout de jure*, yet here, *quoad civilem effectum*, it could not be so proved: for else a Noble-mans whole and ancient Heritage, might oft-times be taken away by witnesses, since processes depending, might extend to a Noble-mans whole Estate. 4. It was alledged that Ratihabition, or any deed, *ex post facto*, did not infer the contravention of this Act, which required explicit deeds, as beating, bleeding, &c. The Lords, before answer to these two last alledgiances, ordained Witnesses to be led, before answer, for clearing the nature of the Act, and violence committed against them; but in this case, as in all others, if the one party beat, the other being forced thereto by self defence, the striker would not, *eo casu*, fall under the certification of the Act of Parliament, as was found the last of January 1673. *John Sliech against Swinton*. In which case, the Lords also found that the certification of this Act, did reach such as wounded one another, during the dependence of a pursuit, before an Inferiour Court; though it was alledged, that this respect was only due to the Lords of the Session, and that the Act should only reach, such as pursued Acti-



ons before them, for, to lose the whole Plea, was too great a punishment for an incident Ryot, before an Inferiour Court.

I find likewise, that one *Weir* having been pursued for slaughter, the 15 of June 1591. he alledged, he was absolved by a Rolment of Court at *Aberdeen*. To which it was replied, that the King had given a warrand for a further tryal, which reply, founded upon His Majesty's warrand, was repelled, as contrary to Law, & because it was but a privat Rescript, not subscribed by the Chancellour, not past in Council: And in respect, the Lords of Session had given a warrand to proceed, notwithstanding of the Kings privat Warrand. It is also observable (though I think it irregular) that *Ludwborn* having raised, in Anno 1596. a pursuit against *Mowat*, and others, for taking him out of his house, without a lawful Warrand, gave in a Bill to the Lords, complaining that the Duke of *Lenox*, as Leivtennent of the North, intended to repledge; whereas that Jurisdiction was only cumulative with the power of the Justices: and that he had a Letter from His Majesty, ordaining the Justices to proceed; wherefore, he craved that the Justices might be commanded to proceed, which Petition was granted.

VIII. Albeit *regulariter*. the Parliament, or Council grant Warrands to Advocats, to appear for such as are Pannelled before the Justices: yet I find that the Lords granted a Warrand in *Balmerinochs* case, to Advocats to compare for him. And seeing Advocats are subject to the Jurisdiction of the Lords it is most reasonable, that the Application be made to them: for the same reason likewise, I find, that when any of the Lords are appointed Assessors, in Criminal cases by the Council, that they must have a Warrand also from the Lords, for sitting there, as in *Tosbes* case, 1637.

## TITLE IX.

### The Admirals Jurisdiction in Criminals.

- 1 The Jurisdiction of the Admiral, extends to all Crimes committed within Flood-mark.
- 2 Our Admiral has execute Pirats.
- 3 Whether it be lawful for such as apprehend Pirats, to execute them by their own Authority, in the Ocean, or when Judges refuse.
- 4 Any Nation may judge Pirats.
- 5 Whether the Justices have a cumulative Jurisdiction with the Admiral,

I. **T**He Lord high Admiral and his Deputs, are by the Laws of all Nations Judges competent to the tryal of all Crimes committed at Sea, and by an unprinted Statute with us, the Admiral is competent in all controversies, actions and quarrels concerning Crimes, faults, and trespasses upon Sea, or so far as the same flows, or ebbs, *vid.* Ship-laws corrected by *Balfour. tit. Admiral. &c. cap. 2.* Our Learned Countrey man, *King* in his Treatise which I have sayes,

*Admirans habet merum imperium, mixtum, jurisdictionem simplicem; potest enim non solum jus dicere, quod est jurisdictionis simplicis, exequi, imperare, judices dare, coercere; quæ sunt meri imperii, sed est in facinerosos animadvertere, quod est meri imperii, de omnibus igitur contraversis marinis cognoscere potest Admirans. marinas intelligo, quæ negotiationis causa ineuntur, sive extra mare, sive in mari celebrantur delicta tamen ex necessitate intra maris fluxum perpetrari debent.*

In Scotland, the Deans of Guild were, as *Walwood* observes *tit. 23.* ordinary Judges of old betwixt Mariner and Merchand; Likeas, the Water-Bailiff betwixt Mariner and Mariner, and the Justice-general was Judge in Criminals, but now no Judge may meddle (says he) with the Admiral causes, but only by way of assistance, and that by commission in difficult causes, as was found in that action, *Antoni de latour* against *Christian Marteis*, 6. of November, 1642.

II. In October 1635. *Bernard Gilermo*, and some Spanish, Dutch, and French Pirats, being apprehended, Mr. *James Robertson* then Admiral deput, craved that the Council would name Assessors to him in the tryal of these torreigners, and they being named, a Court of Justiciary of the Admiralty (for the Registers of the Admiralty give it that Title) was kept at *Irwine*, and these Pirats indicted and hanged for Piracies committed by them upon *France*, *Spanish*, and *Dutch* Merchands, the parties injured are received witnesses, else these Crimes at Sea could not be proved; this tryal was by an Assize, as before the Justice.

III. By the Maritim Law of *England*, it is lawfull for any man who takes a Pirat in the Ocean. to hang him at the Main-yard, because as it seems to me the Ocean is within no mans Jurisdiction, & so every man is left to his own natural liberty; but this may prove very dangerous, for thus men may execute their revenge in place of Justice, and may make innocent men Pirats. for their privat advantage; and Judicatures are established to prevent such Injuries; and upon that pretext men may as well adjudge Prizes taken upon the Ocean: But yet if a Ship be on her voyage to remote places as the *Indies*, so that the takers cannot keep the Pirats till they come to a harbour, they may in that case execute them at Sea, for that is a kind of self-defence; and necessity makes Law. But I think this necessity must be proved, *vid. Grot. de jur. belli. lib. 2. c. 20. §. 14.* And for this same reason, I differ from that Author, who asserts, *num. 12.* that if the taker bring a Pirat to a Port, and the Judge refuses, or delays Justice, so that the taker must lose, then the taker may execute Justice himself; for this were to make every man Judge, not only of the Pirat, but of the judge to whom application was made, and a Privat person might as well pretend, that if a Judge delayed, or denied Justice against such, as we pretend did either rob or affront us, we might do Justice upon them our selves, contrary to many Laws, and particularly to *l. nullus C. de judais.* The same learned Author, *Juris Maritimi*, doth tell us, *cap. 4. num. 14.* that if a *Spaniard* rob a *French-man* on the high Sea, both their Princes being in amity amongst themselves, and with *England*, and that the Ship is brought into the Ports of *England*, the *French-man* may proceed againg the *Spaniard*, to punish him; but if the Ship be brought, *intra presidia* of that Prince by whose Subject the same was taken, it may be doubted if he can proceed Criminally; but the taker must resort to the Pirats own Countrey, or where he carryed the Ship. But in my opinion, a Pirat may be Judged by the Judge of any Nation, for he is an enemy to all Nations, and though he be not deprehended committing a Crime in the Sea of that Prince, or State, within which he is deprehended, and so seems not lyable to their Jurisdiction, *nec ratione loci delicti, nec originis, nec domicilii*, yet he who is of

no Nation, is of all Nations, as Vagabonds are; and he who is an enemy to all Nations, commits a Crime against every Nation.

IV. Though the Admirals Criminal Jurisdiction extends no further than Crimes committed at Sea, or within Flood-mark, yet he is some times Judge, *ratione contingentie & ob continentiam causam*, as if a man rescue a Pirat out of Prison, though this Crime be committed without Flood-mark, yet the Admiral is Judge, because it hath dependance upon, and arises from the principal Crime to which he is Judge: and if the Admiral begin to present Pirats, or Malefactors at Sea, he may continue his pursuit, and apprehend them at Land and without his own Jurisdiction, but he must in that case seek concurrence from the Magistrat of the place, *Lacen. cap. 3. num. 2.*

Though the Admiral has a Criminal Jurisdiction, yet some alledge that he has not this properly as Admiral, but by vertue of a Commission of Justiciary contained in his Gift; and therefore when the Admiral proceeds to try Crimes, the Court is not called the Court of Admiralty simply, as in other Cases, but the Court of Justiciary of the Admiralty.

It is likewise doubted, whether the Admiral hath the sole power of judging Crimes committed at Sea, or if the Justices have a cumulative jurisdiction with them, and may prevent; and that the Justice have a cumulative Jurisdiction is clear, for I find, that in Anno 1613. the Justices did hang one John Davidson, and John Lowe English Pirats, and in Anno 1610. they hanged Peter Lowe, John Cock and others. Likewise, English Pirats, which last were hanged upon their own confessions emitted before the Privy Council, and all of them were hanged within Flood-mark. I have likewise seen the Justices Advocate Causes from the Admiral Court, but whether the Admirals sentence in Criminals can be reduced, by the Criminal Court, as their sentences in Civils can be reduced before the Session, I will not determine.

## TITLE X.

### The Jurisdiction of the Commissars in Criminals.

- 1 The Jurisdiction of Church-men.
- 2 Our Commissars are Judges competent to verbal Injuries.
- 3 How far they are Judges competent to Improbations.

I. Church-men are discharged to sit Judges in Crimes, and the Canons of the Greek Church givethem, *σύνω δαίμαξιν*. A bloodless Jurisdiction, upon which account, the Law gives them *audientiam, sed non jurisdictionem, tit. C. de Episcop. audient.* With us these Bishops abstain from Voting in criminal Processes brought in to the Parliament, though there they sit as Heretors, rather than as meer Church-men, and so might pretend to a Voice, upon that account.

II. The Commissars are the Bishops Officials, and so have least criminal Jurisdiction of all other Courts; but yet they are Judges competent to verbal Injuries, which are by the Law accounted Crimes; and the reason why they



are the only Judges competent to this Crime, is, because that Court, as being an Ecclesiastick Court, & *curia christianitatis*, considers these verbal Injuries as Scandals, and so they are allowed, not only to punish the same with pecuniary Mulcts, but with Church-censures, such as to make the Offender stand at the Church-Doors to expiate a Slander: though it was alledged, that the inflicting of such punishments, was only proper to Kirk Sessions, the 15. of February 1669. But though they be the only Judges competent to verbal Injuries, where they are Scandals; yet in verbal Injuries done to persons of Quality, which are called in Law *scandala magnatum*, the Council sustains it self Judge competent; the King being as the Author, so the Protector of all the Privileges of the Peerage; and in verbal Injuries likewise done to Magistrats, the Council are also Judges, Magistrats representing the King, and being his Instruments in the Government.

When verbal Injuries are done by Members of a Court to one another, that Court is likewise Judge competent, all Courts (how inferior soever) having an innat Power to chastise its own Members, and to preserve the Esteem due to it self; and therefore, if any Stranger who has a Process depending before any other Court, as the Session, Sheriff, &c. do abuse contumeliously any Third Party: though no Member: yet these respective Courts may punish the same, if the Injury be done in face of Judgment, and if it be done to any inferior Judge extrajudicially, that Judge if he be in the actual Exercise of his Office, he may likewise punish the same, except the Offender be a Member of the Colledge of Justice, for in that case the Judge extrajudicially injured, must complain to the Lords, but cannot imprison them summarily, because if this were allowed, these Members might be abstracted from serving the Liedges, as an Advocat when he is to plead a Cause, or a Clerk when he is to give out a Decreet: And this last has been frequently so decided.

Though verbal Injuries amounting to Scandals, are only to be punished by the Commissaries, yet where they have nothing in them of Scandal, but are rather Reflections upon the Honour of the Party injured, as to call a Gentleman a Puppy, or an Ass; It may be the Privy Council, and not the Commissars are Judges competent.

The Commissars are also Judges competent to Adultery, in so far as concerns Divorce, *vid. tit. Adulterii*.

III. How far the Commissars, and inferior Judges, are Judges competent to the improving of Writs, and declaring them false, has been variously decided; but they may be reduced to these conclusions. 1. No Inferiour Judge is competent, to try the falshood of Writs, by the indirect manner of improbation, that is to say, by presumptions, for that way of Tryal being in effect, *nobilis officii*, is only competent to the Lords of the Session. 2. Commissars and other Inferiour Judges, are only competent to improbations, even where the direct manner is extant, if improbation be proponed by way of exception or reply; for then the tryal of Falshood falls in necessarily as a part of the Process, and without this were allowed to these Inferior Judges, they could proceed in no case; for if a pursuit were intended before them, upon a Bond, they behoved to sist, if the Bond was alledged to be false; or to stop, if the Defender should offer to improve the execution of the Summonds: but yet they are not competent by way of Action, even where the direct manner is extant: as was decided the last of November 1630. *Williamson contra Cushey* 3. If the Commissar, or other Inferiour Judge, pronounce once a Decreet, he cannot thereafter reduce his own Decreet, as having proceeded upon false executions, tho' the Executions were given by his own Officer, since they are only Judges competent to such forgeries, *incidenter*: but after sentence, they are *functi*; as was found the 29. of Jan. 1677. *Cowan, contra the Commissar of Glasgows Fiscal*

Fiscal, and according to these conclusions, the late instructions given to the Commissars, are to be interpreted.

## TITLE XI.

### The Jurisdiction of Regalities in Criminals.

- 1 The Origine of Regalities.
- 2 They are accounted Inferiour Judicatures.
- 3 Why the Heretor of a Regality, is called a Lord of Regality.
- 4 Whether His Majesty may erect Regalities within the Bounds of heretable jurisdictions.
- 5 They cannot repledge in case of Treason, nor from Justice Airs.
- 6 The difference betwixt Ecclesiastick and Laick Regalities, and from whom they may repledge.
- 7 The form of a Repledgiation.
- 8 Regalities must have a Burgh of Regality, and to what that Burgh is tyed.
9. The effects of a Lord of Regalities power.

I. BY the Feudal Law (to which Regalities owe their origine) *alia erant regalia, alia erant feuda regalem dignitatem habentia*, which is the same difference in our Law, betwixt Regalia, and Regalities. Regalia, are such priviledges as immediatly belong to the Crown, and do not originally belong to, nor can be communicat by, any else; such as to Coin Money, to open Mines of Silver, Gold, &c. But Regalities are Fews, which are granted by the King to a Subject, they have as large a Jurisdiction, as the Sheriffs have in Civils, or the Justices in Criminals; the *habilis modus*, of granting which Rights, is by Signator, whereupon a Charter followes, which passes the great Seal.

II. Regalities are accounted Inferiour Judicatures, *cap. 76. quon. attach.* by which it is Statute, that no Inferiour Judge shall judge the Pleys of the Crown: and Regalities are expressly numbered amongst inferiour Courts, *As, 173. Pa. 13. K. Ja. 6.* By which it is likewise Statute, that he who strikes any person, in presence of the Justices, shall incurr the pain of death; but he who strikes any before the Sheriffs, Lords of Regality, or other Inferiour Judge, shall only pay a hundred Pounds; but though they be accounted inferiour Judges, when compared with the Justices, or Commissioners of Justiciary, yet they have greater power in the way of their procedor, and in the proportioning of their fines, than Sheriffs, or other inferiour Judges have; for they may fine in a hundred Pounds, though Sheriffs and others cannot, as was found the 30. of January 1663. *Stewart against Bogle.* And generally they have the same power, and the same allowance with the Justices, except when an express Law makes a difference betwixt them.

The 43. *As, 11. Par. K. Ja. 2.* appoints that no Regalities should be granted, without deliverance of Parliament; which nullity, of old, could not have been received, *ope exceptionis*, if it was clad with possession, *Hadd.*

1610. and they were still subject to Revocation by the King, if they were otherwise granted, as may be seen by the Revocation, 1633. and all preceding.

III. He in whose favours the Regality is granted, is still called the Lord of Regality, though he be otherwise but a barron; the reason of which, I take to be, because by the Feudal Law, *tria erant tantum fœda regalem dignitatem habentia, & quibus ieratur jurisdictio regalis*, viz. *Ducatus, Marchionatus, & Comitatus*, and by the same reason it is, that no Lands can be comprehended under this Jurisdiction by our Law, but such as belong to him, in whose favours that Jurisdiction was granted, either in Property, or Superiority; and therefore it was found, that His Majesties Palaces, (though situated in Burghs of Regality,) were in Law no part of the Regality, but off the Royalty, and that such as lived in these Palaces, could not be cited at the Head Burgh of the Regality, but at the Head Burgh of the Shire, the 11. of January 1662. L. Carnagie against the Lord Cranburn.

IV. Whether His Majesty may erect Regalities within the Bounds of Heritable Sheriff-ships, is controverted with us; and if he may, certainly he may thereby evacuate the Office of Sheriff-ships, though bought with real Money, which is hard. And yet the Exchequer past a Signator of *Drumlanrig*, albeit *Niddisdale*, within the bounds of which Sheriff-ship it is erected, be an Heritable sheriff-ship, and the like decision is related by *Hop. M. b. t.* and the reason seems to be, that his Majesty by granting an Heritable Sheriff-ship, alters not its nature; and the nature of a Sheriff-ship, is, that His Majesties is not thereby divested of Jurisdiction, and the Sheriff appointed, being but His Majesties Deput, his Creation cannot hinder His Majesty to erect a new Jurisdiction, within its bounds, as he may erect a Burgh-royal therein, or a Justiciary, &c. When Lands are dispon'd in Conjunct-fee, the Heritor retains still the Office of Regality, *Hop. hoc tit.*

V. Albeit it be regularly true, that Lords of Regality have the same Jurisdiction with his Majesties Justices: yet this rule suffers two exceptions, 1. In the case of Treason, to which the Justices are only Judges competent, and that not only where the Treason libelled, amounts to the Crime of *Perduellion*; but even in Statutory Treasons, such as firing of Coal-heughs, Theft in landed men, &c. And some Lawyers are likewise of opinion, that these Crimes which are declared to be the four Points of the Crown, viz. Robbery, Murder, Fire-raising, and Ravishing of Women, should not be liable to their Jurisdiction; which opinion is founded upon the 2. *cap. leg. Malcolm. 2.* By which it is Statute, that all Robbers, Forcets of Women, Murderers of Men, and Burners of Houses, shall answer before the Kings Justiciar; and are therefore called Pleys of the Crown. And by the 14. *cap. Stat. Alex. 2.* it is ordained, that in all the Courts of Bishops, Abbots, and the Lords whatsoever, the four Pleys shall be reserved from their Court, to the Kings own Court, because they belong to the Crown: which is confirmed by the 76. *C. quon. attach.* Likeas *Skeen de verb. signif.* Upon the word *Placitum*, is clear, that these four Pleys of the Crown, belong only to the Crowns Jurisdiction, or Justice general, in the same manner with Treason he there likewise observes, that they are called *placita* from the French Word *placitare*, which signifies *Litigare*, as *Mollineus* observes, *Sup. cur. Parl. parti. primo cap. Sexto*: And yet *de facto*, Lords of Regality do ordinarily judge upon these Crimes without any Commission. And I find that the 22. of July, *Brown* is affoizied from a pursuit of Fire-raising because he had been formerly pursued before the Marquess of *Hamilton*, and affoizied. Actions of Deforcement also, in my opinion, being intended before the Justices, cannot be repledged, for the Kings Messenger being then Deforced, it is not fit that His Majesty should be obliged to seek justice from inferiour Judges



Judges where His Officers of State cannot attend to pursue, and *cap. 27. 14. Reg. Maj.* it is said, that *ad solum curiam Regis pertinet placitum de namo vetito*, and this the Justices sustained, the 23. of November 1675. in the case of *William Crighoun*, though the debate was not allow'd to be booked.

The 2. exception is, that no Bailie of Regality can repledge from Justice Airs *Act 29. Parl. 11. Ja. 6.* which was likewise Statute formerly, by the 26. *Act. Ja. 2. Parl. 6.* But in this case, the Baillie of Regality may sit with the Justice general, yet seing the foresaid *Act* of the 11. *Par. King. Ja. 6.* allowes only no Repledgiation to be from Justices Airs, holden by the Justice-General, it may be doubted, if vvhhen Justice-Airs are holden by the Justice-Deputs, or others, by vertue of particular Commissions, there may not be Repledgiation allowed in that case; but I think there cannot, seing the *Act* of *Par. Ja. 2.* is general: and *Skeen* remarks this as a priviledge of the Justice-Air, *qua talis*.

VI. Regalities are divided with us, in Ecclesiastick, and Laick; Ecclesiastick Regalities were such, as were erected in favours of Bishops, Abbots, &c. And there are but very few Abbacies in Scotland which were not erected in Regalities; and when these were annexed to the Crown, by the foresaid 29. *Act. Parl. 11. K. Ja. 6.* It is declared, that the Baillie, or Stewart of the Regality shall have the same power he had before to Repledge, from the Sheriff or Justice-general, in case he have prevented the Justice-General, by apprehending, or citing the person, before he be apprehended, or cited by the Justice; but, if the Justice have prevented, as said is, then the Baillie, or Stewart of the Regality, shall not have power to Repledge, but he may sit with the Justice general, if he pleases, so that in effect, by this *Act*, there is difference betwixt Ecclesiastick and Laick Regalities; that in Laick Regalities, there is a Right of Repledging still, as said is: whereas Ecclesiastick Regalities have not this priviledge, except they preveen the Justices; but otherwise, the Baillie of Regality may only sit with them: Which difference seems to be acknowledged in the debate, at his Majesties Advocats instance, against several Fore-stallers, upon the 26. of June 1596. And thus Mr. *John Prestoun* then Deput to the Regality of *Musselburgh*, was not allowed to repledge, but to sit with the Justices, in the tryal of some Witches, upon the 29. of July 1661. The reason of this difference was, that the Regalities having been only granted; in favours of the Religious Houses which were suppressit. The Regalities became extinct with them, and his Majesty having *ex gratia*, only renewed their Offices to the Lords of Erection, he thought that they were abundantly gratified, by this new concession, without allowing them the power to exclude his own Justices, in case of Prevention; and this was also a favour to the Liedges, in not troubling them with two Courts. Nor were the Lords of Regality much prejudged; for by this same *Act*, they retain the whole right to the Escheats, & Fines, even of these who are condemned by the Justices. And therefore the Lords found, that the Lord of Regality had right to the Escheats of such as were condemned by the Justices, or Justices of Peace, the 22. of July. 1664. *Elizabeth Sutherland contra Conradge*: so that this holds not only where the Justices sit with the Lord of Regality: but likewise where the Justices condemn without the others concurrence; and yet it may be urged, that since the Lord of Regality serves not in that case, he ought not to get these Casualties, which are the reward due to these who do justice, and the Lord of Regality has himself only to blame, who did not either preveen, or repledge.

Baillies of Regalities may likewise repledge from the Kings Lieutenant, as was found the 19. of August 1596. And as is clear by the foresaid *Act* of Annexation: And likewise from any Commissioners appointed by the Council, as was found in May 1568. And from the Justices of Peace, in Riots, and Bloods: as was found by the Lords of Session, July 1617. though these Causes being of small moment, and requiring summar and unexpensive Cogni-

tions, seem to require easier, and less solemn Tryals in the Proceador, than Repledgiations will allow. And yet by *c. 11. de appel.* I find that *licebat in re minima appellare*; nor can the Parties injured complain, since they might have made their application to the Lord of Regality: Nor should their Error prejudice his Jurisdiction.

VII. The manner of Repledgiation from any Court, is, that either the Party himself, who hath the power of repledging, or some other having a Procurator from him, compares and produces his Charter of Erection; for the production of the Seal is not sufficient, seeing that is but *assertio Notarii*: yet sometimes without Production of the Charter, Repledgiation will be sustained: because it is not our that the Repledger hath a Regality; as in the Duke of Lennox case, 1637. As also Repledgiation will be sustained, upon production of the criminal Register, bearing, that it was formerly sustained to the same persons, May 1668. *Ardincaple* against the Commissioners of the Highlands: Yet it may be doubted, whether the Production of a Lord of Regalities Return, will be sufficient to instruct that he hath a Regality: and it appears it should, since a Return is a Sentence, and so is a sufficient Instruction, till it be reduced.

He who offers to repledge, must find Caution of *Culrach* to do Justice, within year and day, upon the person whom he repledges; and if the Judge to whom he is repledged, doth not justice within year and day, he *tines his Court* (as we call it) for year and day; and the *Culrach* (for so the Cautioner is called) who hath, upon his becoming Cautioner, borrowed the Defender, is in an Unlaw, and the Judge from whom he was borrowed, or repledged, may proceed to do Justice, as formerly: *Skeen de verb. sig.* The Pannel likewise, who is repledged, must find Caution for his own appearance before the Lord of Regality. to underly the Law, for the Crimes laid to his charge, he 16. of May 1599. *Patrick Mackalla*, against the Regality of Lennox.

No person can be repledged, except he be present at the Court, from which he is desired to be repledged: For a Party who is absent, cannot find Caution to list himself before the Court, to which he is repledged; as was found in the case of *Armstrong*, who being pursued for murdering some Customers, was desired to be repledged by the Earl of Annandale, Anno 1666. Nor can a person be repledged after Defences are proposed for him: for this being, *recusatio judicis*, it must be, *ante omnia*, proposed, *dum res est integra*.

VIII. When Regalities are erected, there is a Burgh of Regality expressed therein; and though that Burgh may choose Baillies, yet the Baillie of Regality hath still a cumulative Jurisdiction with those Baillies of the Burgh of Regality, in that same way that other Superiors retain still a cumulative Jurisdiction with their Regality; as was found the 24. of January 1668, betwixt the Baillie of Killimure, and the Burgh thereof. This Burgh is obliged to maintain a sufficient Prison, not only for Criminals, but for Debtors, by the 272. *Act. 15. Parl. Ja. 6.* And all Captions bear the Letters, to be direct to Baillies of Regalities, &c. And yet by that Act, these Burghs seem only to be obliged to intertain Prisoners, where there are Provost, Baillies, and Common-good, *Nota*, that these Words of that Act, *by the Sheriffs to Stewarts, and Baillies of Regalities, are ill printed* for the Word *to* should be *or*. The Lords likewise decided thus against the Baillies of Regalities, the 7. of July 1668. *Hamilton contra Callender*. In this Burgh all Courts must be holden, yet Defenders are obliged to compare at any other place within the Regality, to which they were expressly cited. As *Had.* observes in a case, the 16. of March 1622. Or, if the Lord of Regality was in use to hold his Court else where, for a considerable time without interruption, the Vassals, or any other Defender, is obliged to appear thereat, though it be not the place designed in the Charter of Erection, as *Had.* observes, December 1624. And if the Party, who

who is desired to be repledged, dwell within the Regality the time of the committing of the Crime, the Repledgiation will be sustained, though at the time of his being accused, he be removed without the Regality; As was found the 21 of November 1632. In the case of one *Weems*, who was desired to be repledged, to the Regality of *Metkmen*.

Lords of Regality are obliged to hold Justice-Courts twice a Year, 3. *Parl. K. 7. 2. Act. 5.* And if they be negligent in causing rest and stolen Goods be restored, the Sheriff may fulfil their place, *Act. 11. Parl. 15. Ja. 2.* And when Erections fall into the Kings Hand, the Inhabitants thereof may be justified, *id est*, judged by the Justices, *Act. 26. Parl. 6. K. Ja. 6.* But this Act can only take place, till a Stewart, or Baillie be appointed. For Regulariter, the Kings own Stewarts of Regalities may repledge from the Justices.

A Lord of Regality cannot sit himself in his own Court, but must administer by a Baillie, who is sometimes admitted by a simple Commission during his Life; or otherwise he is admitted to be Heretable Baillie: Which Right passes by Infeftment; but this Baillie is in Lands belonging to the King, and is properly called the Stewart of the Regality: Though sometimes the Kings Deputs in Regalities, are likewise call'd Baillies, as in the 5. *Act. 3. Parl. K. Ja. 2.*

IX. Lords of Regality cannot cite Witnesses, without their own Jurisdiction, but they must have Letters of Supplement for that Office; though generally they may proceed in the same way that the Justice-general doth; but they may exact Caution to enter as Law will, from the Defenders, after Sentence is given, as was found the 7 of October 1668. betwixt Mr. *John Prestoun*, and Mr. *John Rafe*, which seems to be a greater Priviledge than the Justices have, who cannot presently exact Caution of any person, for paying an Unlaw, but can only raise Letters of Horning upon the Act of Adjournal.

The Lords of Regalities have Right to the single Elcheat of Rebels, living within their Jurisdiction; as also to the Elcheats of all persons condemned for Crimes, committed by the Inhabitants within their Jurisdiction, albeit condemned by the Justices: From which general Rule, *Hope* in his lesser Practiques, excepts only the case of Treason; but it may be doubted, whether exception may not be likewise made of all other Pleas of the Crown, seeing the Lord of Regality is no more Judge competent to these, than he is to Treason.

I was once consulted, whether a Lord of Regality might place a Gallows upon any part of his Vassals Land, lying within his Regality? and at first it seemed that he might: for *unaquaque gleba servit*: and what was lawful in some part, was, where there is no Restriction lawful in any part: but if there was a former place fix'd upon by custom, I think the Lord of Regality could not alter the same. 2. If there were any apparent design of affronting the Vassal, I believe he could not use this Priviledge; as if he did offer to place the Gallows at his Vassals Gate, or at his Garden-door, or any such places: for where the Law says, that *quilibet potest uti jure suo*, it adds, *modo hoc non faciat principaliter in amulationem alterius*. 3. Even in other places, there is some *moderamen & decorum* to be observed: and I doubt not, but upon application to the Privy Council, they would appoint some persons to choose an indifferent place: For even in these Servitudes, *ubi unaquaque gleba servit, hoc accipiendum est civiliter* (says the Law) & *non judaice*: For if a man should grant me a Servitude of a way to my House through any part of his Ground, yet I could not compel him to throw down his Garden-Walls, or to suffer me to go thorow his Corns, if there were, or might be another passage found, though it were not so near.



## TITLE XII.

### The Jurisdiction of Sheriffs in Criminals.

- 1 *The Origine of this Office, and how it is conveyed in Scotland.*
- 2 *He is the chief Preserver of the Peace, and so may convocat the Liedges, apprehend Sayers of Mass, false Coyners, &c.*
- 3 *He is not Judge to the four Pleys of the Crown.*
- 4 *The way of Procedure before the Sheriffs.*
- 5 *Whether he may judge where no privat Party complains?*
- 6 *He should attend the Justice Aires.*
- 7 *How he is to be punished if he transgress in his Office?*

**A** *Lluredus*, in the League made with *Guntherus* King of Denmark, divided England, in *Satrapias*, *Centurias*, & *Decurias*, and called *Satrapiam* a Shire, that is to say, a Section or Division of Land, from the word Shire, which signifies to cut, so that a Sheriffdom is a Jurisdiction within the Bounds of a particular limited Countrey : It is called in our Latine Stile, *vice comitatus* ; and though most of the Shires in Scotland be erected in Sheriffdoms by particular Acts of Parliament, yet by an un-printed Act in Anno 1504. It is declared that his Majesty may Erect, Unite, or divide Sheriffdoms without consent of Parliament : And though his Majesty erect a Burgh-royal, or Barony within the Sheriffdom, yet they still continue to be under the Jurisdiction of the Sheriff, and they have a cumulative Jurisdiction with him ; but not privative of him. Sheriffs in Scotland, are either during Life, and then the Office passes by a Signatour, and passes the great Seal, or otherwise it is conferred as an heretable Right, *quo casu*, though it be transmitted in the same way and manner with other heretable Rights, yet because it is *merum jus incorporeum*, it requires no Seisin, but albeit all these heretable Offices were upon good Reasons discharged by the 44 *Æt.* 11. *Parl. K. J. 6.* seing *industria persona respicitur in iudice* ; And albeit, *K. J. 6.* and *K. Charles* the first, did design to buy in all the heretable Sheriff-ships, and bought in many, yet there are many of them to this day enjoyed by Noble-men and others.

II. The Sheriffs of Scotland, have a Civil and Criminal Jurisdiction, but the last of these, is that which we are only to consider as peculiar to this Treatise.

The Sheriff is in effect the supreme Justice of Peace, to whom is mainly entrusted by the Law, the securing of the quiet, and Tranquillity of that part of the Kingdom which is subject to his Jurisdiction ; and therefore though no other person be allowed to ride with Gatherings of the Leidges, yet the Sheriffs is, nor can he be pursued for a Convocation upon that Account ; seing he may convocat at his pleasure for repressing of Tumults, and upon many other accounts, as was found in February 1664. betwixt the Earl of Seaforth

forth, and the Laird of Ballingown, for it doth belong to his Office, to discharge all Convocations of the Liedges, and if they refuse, he should continue his Court, and advertise the King. K. Ja. 3. Parl. 14. *At* 104.

Albeit, in *civilibus*, neither the Sheriff, nor Barrons, can hold Courts in *ferias*, or close, time of Vacance. Yet in Criminals he may hold Courts during the time of Vacance, *quia periculum est in mora*, as is observed by *Haddington*, the 19. January 1623. And Sheriffs have not power to exact Caution from a Malefactor to underly the Law, for he cannot proceed except either the Defender be cited, or, *deprehensus in flagrante crimine*, 25. Mart. 1628.

The Sheriff is Judge competent to the Crime of Witch-craft, Queen Mary her 9. Parl. *At* 37. albeit *de praxi*, none used to judge Witch-craft, but the Justices, or such as have a particular commission from the Council. They should apprehend the sayers and hearers of Mals, *Act* 5. Pa. 1. J. 6. And the strikers of false Coyn, J. 3. Pa. 3. Cap. 18. but they are not allowed by the Law expressly to proceed in either of these cases; from which it may be argued that they are not Judges competent thereto, for else the Law had expressly allowed them the same, (*& inclusio unius est exclusio alterius*;) They should apprehend, punish and banish Sornerers, J. 2. P. 6. cap. 22. Egyptians, Ja. 6. P. 12. cap. 124. Idle-men, Ja. 1. P. 3. cap. 66. Shooters with Fire-works. 2. Mary. Par. 4. cap. 9. Fore-stallers, J. 5. P. 4. cap. 20. Transporters of Neat and Sheep, and other Cattel, J. 6. Parl. 7. cap. 124. Ja. 6. Par. 12. cap. 129. The destroyers of Planting, K. J. 6. P. 6. cap. 84.

III. Sheriffs may at any time condemn for Blood-weits, but the Penalty cannot exceed fifty Pounds.

The Sheriff, nor any other inferior Judge can judge the four Pleas of the Crown, viz. Open Robbery, Fire-rising, and Ravishing of Women, and Murder. Yet of old, Sheriffs might sit upon Slaughter, if the Committers were attacht within forty days thereafter. cap. 39. *quom. attach.* And *At* 89. Par. 6. J. 1. And if he be taken red-hand, he should be execute by the Sheriff within that Sun, *Ibid.* And yet by the 28. *At* Parl. 3. K. J. 4. Three Suns are allowed conform to the old Law; and if the Committer of the Slaughter flee, the Sheriff shall acquaint the next Sheriff, and so from one Judge to another, until the Committer be apprehended, and when he is taken, he is to be sent back to that Sheriff where the Crime was committed, where justice is to be done upon him, and if he be found guilty of Forethought-felony, he shall dye; therefore *Act* 89. Par. 6. Ja. 1. *Ratified Act* 28. 3. Par. K. 1a. 4. with this Addition, that if any heretable Sheriff omit his Dury in prosecuting of this crime, after this manner, he shall lose his heretable Office for three years, but if he have only that Office for the time, he shall lose it during all that time. From which Acts it may be concluded, that the Sheriff is not only Judge competent to Slaughter, but to Murder, and both to the one and to the other at any time, if he has either apprehended the person, or has *ex incontinenti* done Diligence for apprehending him, but the Sheriff is not Judge competent to Murder, though committed within his jurisdiction, except in either of these cases.

IV. The way of Procedure before the Sheriff, is by an Affize, and the Procurator-Fiskal is Pursuer in place of his Majesties Advocat; Yet sometimes the Sheriff, or Baron may condemn upon the Pannels confession, without an Affize, as *Dur.* observes, penult January 1622, but if the Party be present, the Sheriff cannot condemn him, as holden *pro confesso*, though he refuse to depone; but *eo casu* he must put him to the knowledge of an Affize, as was found 24. July 1633. *Dickson contra Halyday.* and albeit a Blood proven by confession, may be punished by an Unlaw of fifty pounds; yet when Blood

is punished upon contumacious refusal to swear, the unlayv cannot exceed ten Pounds, 17. Feb. 1624.

V. The Sheriff may pursue, when any person compares and insists with him in the pursuit, but if the Crime be pursued by way of inditement without the concurrence of any party, the Justice general is only Judge competent thereto: *Skeen, Verbo Sheriff*, but that rule is too general; and may admit of this distinction, viz. that either the Thief is taken with fang, and then the Sheriff may proceed to Judge him, though no privat pursuer insist against him. Nor needs there three fangs for justifying that pursuit, Albeit Sheriffs now never proceed, but where three fangs are proved. Or else no fang is found, & *eo casu*, the Sheriff cannot judge the Thief, except there be a pursuit intended at the instance of a privat party.

VI. The Sheriff should assist in all Justices Airesholden by the Justice General, or the Chamberlain, and should produce the verifications of all the Summons which is made to the Justice-Air, & should make provisions at the Justice-Air, & his Clerks, which should be allowed in the first end of his accompts to the Exchequer & he should arrest such persons as the Crowner cannot arrest, & should thole an Assize upon the last day of the Justice Air, anent the execution of his Office. *Ja. 3. Par. 14. cap. 102.* and if he be found culpable, the Justice General may remove him from his office till the next Parliament, and put another in his place to officiat in the interim. *St. Rob. Bruce, ex lib: Sconen.* related by *Skeen, ibid.* but much of this is antiquated by custom. for the Thesaurer sends along with the Justice Air, a person specially commissioned by them, who defraves the charges of the Justices and Justice Clerk.

VII. If the Sheriff fail in his duty, he was punished of old by the losse of his office during his life, and imprisonment during His Majesties pleasure, *St. Da. Cap. 13. & 69.* But now for negligence in his Office, he tines the same for year and day, and is punishable in his person, and goods, at his Majesties pleasure, *Ja. 2. Par. 14. cap. 37.* And yet the Lord *Tester*, having suffered two Thieves negligently to escape, and his heretable office of Sheriff-ship, being upon that accompt taken from him by King *James* the fifth, that Decreet was reduced, for it was found too small to infer the los of an heretable office, *Stat. Sessionis, pag. 34.* which is observed by *Hop.* likewise in his larger *Practiques.*

If the Sheriff absolutely refuse to do Justice, he loses likewise his Office, and is punishable at his Majesties pleasure, but if he do injustice, he loses his Office, if it be heretable, for three years; but if it be not heretable, he loses it during the time he was to enjoy it formerly, and in both cases he is punishable, arbitrarily in his person, and is obliged to refund the damage and interest sustained by the parties lād, *K. J. 3. P. 5. cap. 26.* but if he bribe or give partial counsel, he forfeits his fame, honour and dignity, and is likewise punishable in his person and goods, *K. J. 5. Par. 7. cap. 104.* If the case be difficult, the Lords of Session will sometimes Advocat the cause from the Sheriff to the Justices, as in the case of Theft-boot, pursued by *Connage*, the Sheriff-deput of *Inverness* against *Makintosh*, And sometimes the Council will discharge the Sheriff to proceed without Advocating the Cause. if they find either the case to be difficult, or the Sheriff and his Deputs to be suspected.



## TITLE XIII.

## The Criminal Jurisdiction of Barrons.

- 1 *In what case Barrons may judge.*
- 2 *The Clerk of that Court needs not be a Nottar.*
- 3 *Whether he may punish Theft, or Fiee-raising.*

I. **A** Barron in our Law, is generally understood to be one who is Intest in any Lands, though not erected in a Barrony; in which sense he has no Jurisdiction, but only that he can unlaw his own Tennent for Blood committed upon his own Ground, as was found the penult of Jannary 1622. *Johnstoun* against the Laird of *West-nisbit*: But a Barron properly, is he who is infest with power of Pit and Gallows, *fossa & furca*.

A Barron judges Crimes in the same manner, as they are judged by the Sheriff, and may like him proceed in time of Vacance, to judge these Crimes, to which he is otherwise competent. But it has been controverted whether Barrons have been judges competent to Processes, for penal Statutes; since the Penalty there was to be applyed to the Kings Fisk, and so should be judged in his own Court: But the Lords found the 3. of *February* 1674. that they were judges competent to penal Statutes, by the constant Custom of this Nation.

Albeit in civil Cases, Barrons may appoint Baillies; yet *Balfour cap. 63* observes, that in *criminalibus*, no person below the degree of a Barron, may sit upon Blood, *nam potestas gladii est meri imperii qua nullo modo delegari potest*, except there be an expreis power given by the Sovereign for that effect, as in the case of Justices and Sheriffs, vvho have povver to depute; and that povver of Deputation vvere unnecessary, if it vvere othervvise competent.

II. The Clerks of all other Courts must be Notars, but the Clerk of a Barron Court needs not be a Notar and yet the Decreet of a Barron for an Unlaw will be sustained, founded upon a Confession, though the Confession be not subscribed, as is observed by *Durie*, the penult of *Jannary* 1622. But by an Act of *Sederunt*, it is ordain'd, that no Sentence of any inferior Court, for above an hundred Pounds, shall be sustained, except it be otherwise warranted, than by the consent of the Clerk.

Albeit by the 75. *Act. Parl. 6. K. Ja. 5.* The Barrons Precepts (for Summons in that Court is so called) should be execute, as Summons before the Lords, and Copies should be left, and they indorsed upon; yet the 11. of *July* 1634. *Hay* against *Airth*, it was found, that Executions by a Barrons Officer are valid, though not given in Writ, and that the same are probable by Witnesses.

III. A Barron having power, may judge of Theft, if the Thief be taken in the Fang, *quon. attach. cap. 100.* where it is statuted; that *baro qui libertatem habet de sock & sack, toll, & theam possunt judicare furem salsum de aliquo furto manifesto, sicut band habband, & back-beirand. de praxi*: Barrons do not punish Slaughter; yet it may be urg'd, that they have power to do

so : Because, 1. The Power of Pit and Gallows would import, the power of judging Life and Death. 2. By the 77. cap. *quon. attach. omnes Barrones qui habent furcam & fossam de latrocinio, de hominis occisione habeant furcam, id est curiam*, as the marginal Note bears : And by the 13. cap. *Leg. Mal.* 2. It is Statute, that Malefactors, who hold of Barrons, may be condemned, after the same manner, that other Malefactors are, except in the four Pleas of the Crown, in which, Barrons have no Power; from which it may be very clearly inferred, that *quoad*, other Crimes they have, *nam exceptio firmat regulam in non exceptis*. 3. By the 91. *Act. Parl.* 1. J. 2. It is Statute, if a man be slain in the Barrony, if the Barron be infest with such freedom, he may proceed as the Sheriff doth. And albeit *Hope* in his larger Practiques observes, that these words of the Act ( *if he be infest with such freedom* ) may receive various Interpretations; yet I see no Interpretation they can properly receive, except this, that these words are meant, if he have the Jurisdiction proper and competent to a Barron, which is Pit and Gallows, *nam verba generalia interpretanda sunt secundum subjectam materiam*.

Albeit Wilful Fire-raising be one of the Pleys of the Crown, yet a Barron may cognosce upon, and punish the Raisers of Fire rashly, within Husband Towns in the Barrony. *Ja. 1. Parl. 4. cap. 75.* The words of which Statutes, are, *If Fire happen within Husband Towns of Barronies, we leave them to be punished by their Lords, in like manner, as Baillies in Towns do within Burgh;* In which Act, by the Word Lords, are meant Barrons, for they are in several Acts of Parliament, called Lords of their own Land, or Barrony.

A Barron may unlaw for Absence, for ten Pounds, but not above; and for Blood, he may unlaw for fifty Pounds, but not above.

## TITLE XIV.

### Of Justices of Peace.

Our Justices of Peace, were called *Irenarcha*, which signifies in the Greek, the Keeper of the Peace, *Irenarcha erant qui ad provinciarum tutelam quietis ac pacis per singula territoria faciunt stare concordiam, dicebantur etiam latrunculares, seu latronum expulsores*. Their Office was to apprehend Rebels and Thieves, whom they could only examine, and send to the President of the Province, but could not judge them themselves; their Office is more fully described, *l. 10. C. tit. 75.* but to speak properly, *latrunculares*, were our Constables called by the Greek Lawyers, *ἀνθοδωκται*

Justices of Peace, and Constables were once fully settled amongst us by *K. J. 6.* but their Office having fallen in desuetude, it was revived by *38. Act. 1. Parl. 1. Sess. K. Ch. the Second.*

By this Act they are allowed to meet four times in the year, and to adjudge of Servants Fees, and of mending of the High-ways, they have power to punish the Cutters and Destroyers of Planting, Green-wood, slayers of Red and black Fishes, Makers of Moor-burn, Keepers of Crooves, wilful Beggars. *Egyptians*, and their Receiptors, Drunkards, Prophaners of the Sabbath, as to

to all which his Majesty promises to give them ample Commissions: and to the end, their power may not prejudice any other Court formerly erected, it is appointed by that Act, that fifteen days shall expire after the committing of the Fact for which the Committer is to be conveyed. Which interval is given to the Judge competent to do diligence, and if he omit the same during that time, then the Justices may judge the same, and one Justice has power to bind the Party complained upon, to the Peace, under such pecunial Sums as he shall think fit, and that either at the instance of a Complainer, who shall give his Oath that he dreads Harm, or the Justice himself may exact the Sum, though none complain. And if any person, being charged to make his appearance before the Justice of peace, shall refuse, if he be a landed man, whose Rent exceeds a thousand Merks, or ten Chalders of Victual, then he shall inform any of his Majesties Privy Council, or if he be a meaner person, he may cause bring him by force before himself.

If the Sheriff, or Baillie condemn any person in Blood-weit, or any other pain, but not proportionally to the Offence; then the Justices shall inform the Privy Council, that they may take order therewith; but if there be no satisfaction made by the Sheriff or Baillie to the party, the Justices may modify a reasonable satisfaction.

If the Sheriff or Baillie do by Collusion, clear the Delinquent of an Affize, the party once cleared is not to be further questioned, but the Judges are to be punished by the Privy Council.

The Justices of peace are declared Judges competent to all Ryots, and breaking of peace, if the Committers be under the Degree of Noblemen, Prelats, Counsellors, and Senators of the Colledge of Justice, who may refer the Summonds to the parties Oath, if he be personally summoned, and thereupon hold him as confest, but if the Summonds be not personally execute, then the Defender is to be summoned of new at his dwelling-house, and these two Citations at his dwelling-house shall be equivalent to one that is personal: if the Committers be above the foresaid Quality, then the Justices, though they cannot judge them, may for preventing of Ryots, command them to find Caution for keeping of the peace, and to compear before the privy Council, and though they compear not, yet whatever breach they commit in the interim, shall be repute as great a Contravention, as if they had found Caution: At the end of every quarter Session, the justices of peace, are to send to the Clerk of the Council, a Catalogue of all such Persons, as they either have committed, or have under Surety, with a short Abreviat of the cause thereof ( which is that which the Civil Law in the former Title calls *transmittere cum elogio* ) to the end that the Council may determin betwixt and the quarter Session what shall be done with them.



## TITLE XV.

The Jurisdiction of the Justices, and  
of the several Imployments of  
the Officers of that Court.

- 1 Who were Judges to Crimes in Greece, and at Rome.
- 2 The Jurisdiction of the Justice Court with us.
- 3 The power of the Justice-general, and Justice-deputs,
- 4 The Office of Justice-Clerk.
- 5 What Actions are peculiar to the justice-Court.
- 6 The Macers, and Crowners of the justice-Court.

I. **A**LL Nations have committed the cognition of Crimes, to the wisest of their Judges, because our lives are our greatest concern, and if the Judge err there, his error can seldom be repair'd. The *Athenians* had the *Areopage* for their Criminal Court, which was the most famous Court, then in the world, of whom the *Grecians* u'd to say, *την ναυσι ο παγοτων αρετοτατων αυτων*. And they judg'd Homicide, in a particular place, *α παλαια*, it was very numerous, and the *εφετοι*, institute by *Solon*, for judging crimes, were likewise so. At *Rome*, *Præfetus Urbis*, judg'd all the Crimes that were committed within the Town & *intra centesimum lapidem*. and the *Proconsuls*, and *Præsidents*, judg'd Crimes in the Countrey. But the *præfetus pratorio*, *præfetus angulastis*, *Comes Orientis*, & *vicarius præfeti pratorio*, had also a criminal Jurisdiction.

The justice Court with us, had for its Members, the justice-General, the justice-Clerk, the justice-Deputs, the Clerk-Depute, the Dampster, the Officer, and the Macers.

II. The Justice-General is constitute by a Gift under the Great Seal, either *ad vitam*, or by a temporary Commission, but still under the Great Seal: his Salary of old, was five pounds for every day of the Justice Air, *leg. Malcol. cap. 2. num. 3. 1.* but now it is Arbitrary, and the ordinary Salary, by his Gift, is two hundred Pound Sterling, to be uplifted by himself, out of the Fines of Courts, and if he cannot attain to payment that way, out of the Exchequer.

The Justice-Court of old, was the only Soveraign Court of the Nation, and had than a great part of that Jurisdiction, which the Session hath now; for they were Judges to Recognitions, Brieves of *Mortancestrie*, *Dissafine*, *Parpresture*, and Distinctions for Debts, *Reg. Maj. lib. 1. cap. 5. num. 2. & lib. 2. cap. 74. quon att. cap. 52. & 53. lib. 3. cap. 28.* And after the constitution of the Session, they remain'd still Judges to Perambulations, and Brieves were directed in Latine, for tryal thereof, and the reason hereof seems to be, because as the Civil Law observes *ad arma curritur in finibus regumdis*, and the fittest person for compescing such Tumults, was the Justice-General; but now the Sheriffs, and Lords of Session cognosce such cases: And I have caused raise an Advocation from the Sheriff of *Triviale*, at the instance of some *Jedburgh* men, to the Justice-General, *ex hoc capite*, the Lords would not sustain the

the Advocation, but remitted the case back to the Sheriff, whom they found also competent, so that such Brieves may yet be directed to the Justice-general, though he have not a privative Jurisdiction therein.

III. I find the Justice-General, called the chief Justice in all the Registers, *Annis* 1637. and 1638. and the principal Justiciar, *Anno* 1503. The Justice Deputs were not limited to any definit number, but usually they were two, and have each a pension from His Majesty when they were constitute, by a Gift from him, which passes the Privy Seal only, and these were still call'd His Majesties Justice-Deputs, and are not Deputs to the Justice-General; for else they could not sit in Judgement with him as they do, and in effect they have an equal power and voice with him; But when he makes a Deput, he should not sit with him, *nam delegatus non simul concurrit*. And I find Mr. Alexander Colvill, call'd in his Gift General-Justice-Deput, which is done to denote the universality of the Jurisdiction; And to distinguish them from Justices in that part, such as are these Noble-men and others, who have the power of Justiciary over their own lands. And in *Binnies* case, the Lords having remitted him to be tryed by the Justice-General and his Deputs; the Justice-Deputes declar'd, that they accepted only of the remit, as meaning they were His Majesty's Justice Deputs: And when His Majesty directs any letter to them, he directs it to our trusty and well beloved Cozen and Councillour to our trusty and well beloved, our Justice-General and Justice-Deputs.

Of old, I find there were eight Justice-deputs. The Justice-deputs had formerly the priviledge of being Present at the Counsel, which was very fit, because many criminal cases comes in before them, and they retain still the priviledge of being present at Parliaments: they were call'd *attornati justiciarum*, *quon. attach. c. 61. & assis. R. David. c. nullus*. By the 1. Article of the Regulation, 3. Session 3. Par. Ch. 2. the office of the Justice-deputs is suppress, and five of the Lords of Session are adjoynted to the justice general, and justice-Clerk, four of the number being a *Quorum*, except at justice Courts, because then the justices are divided, and two may be a *Quorum*; their present Habitis Scarlet, adorned with white; and this I find the Kings of old, had *vestem purpuream sed albi habens non nihil admixtam*, *Pension. de magister. Rom. pag. 574.*

IV. The justice-Clerk has his place from His Majesty by a Gift, under the great Seal, with power to appoint Deputs, for whom he shall be answerable, and is called in his Gift, *clericus nostra justiciaria*; but whether the Justice-Clerk be a Judge or a Clerk only, has been doubted; and that he is a Judge, appears not only from our inviolable present custom, wherein he sits and and presides, when the justice general is not present, and takes precedency from the other justice-deputs; but likewise by the 67. Art. 11. Par. J. 6. expences are ordained to be modified, to the party cleansed, by the Justice, Justice-Clerk, and their Deputs, *sed ita vest*, that modification of expences is a judicial sentence, at least, is *actus jurisdictionis & jurisdictionis tantum explicari potest per judicem & non per auctorarium vel referendarium*.

As to the reason of the name of Justice-Clerk, it is received by Tradition, that because *clerici*, or Church-men of old could not sit in Criminal Courts, seeing the Laws gives them, *parum, auctoritatem*, a bloodless jurisdiction, therefore they were allowed to nominate a Clerk, who might represent them; who was therefore called, *non clericus justiciarii*, the Clerk of the justice Court, but *justiciarius clericus*, yet this seems a groundless conjecture, for in no Municipal Law, could Church men sit upon Blood, and therefore could not Deput, & *qui facit per alium, facit per se*, and what necessity was there, for their having an interest in the Criminal jurisdiction, and to evidence that he was Clerk of the Court: the Clerk who officiates, hath his place by Deputation from him, and

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is called Deput to my Lord justice Clerk; nor could he deput Clerks, except he were principal Clerk. But I believe this invasion, has been made by the justice-Clerk, upon that Court, after he was created an Officer of State: but to solve this doubt, my Lord *Rentoun*, at his admission, is found, by Act of the Secret Council, to be a Member, and one of the judges of the justice-Court and to have a vote there, the 10. of *Decem.* 1663. and now he sits in the Justice-Generals Chair, when he is absent.

The Justice Court have a Seal, which they append to publick Acts, and is kept by the justice-Clerk Deput. This Deput is admitted by the justice clerk, by way of Commission, giving him power to be Clerk to all Courts, holden by His Majesties justice-General, or Deput, or any having particular Commissions, either at *Edinburgh*, or else where: And therefore no justice Court, either in the Border, or else where, is lawful; except it be served either by the justice-Clerk Deput, or any having Commission from him. It seems; that of old, the Writers to the Signet, did use to Write Criminal Letters, without receiving Caution; but that is discharged by the 34. *Act.* 4. *Par. Ja.* 5. And now, though Writers to the Signet may subscribe the Letters, yet the Justice-Clerk Deput can only write the deliverance upon the Bill, and receive Caution, and therefore he writes upon the Bill, *soverty is found*; & subscribes the same. His receiving Caution is likewise warranted, by the 78. *Act.* *Par. Ja.* 4.

V. The Justices are only judges competent to these Crimes, which are called *placita corona*, the Pleys of the Crown, which are four with us, wilful fire-raising, ravishing of Women, Murder, and Robbery, or *Reif*, *J. Malcol.* 2. *cap.* 13. and the cognition of these belongs not to Burghs leg. *Burghs.* 6. nor to no other inferiour Courts, *Quon. attash.* c. 76. *leguntur St. Alex.* c. 14. *femina ef. forciata arsione rapina & murdrum.* *Molineus in Stil. cur. paris part.* 1. c. 13. observes, that in *France*, three Crimes belong to the cognition of the High Justices, wilful fire, ravishing of Women, and Murder; nor can any other Judge proceed to judge these Crimes, except they be particularly warranted by a Gift from His Majesty, to that effect, *Skeen verb.* Murder.

VI. The Justice Court has its Macers, in which they are not stented to a particular number; and though of old amongst the Romans, a pursuer might by his privat authority and force, draw the defender before the judge, *in jus rapere*, *in jus trahi*, which they borrowed from the *Grecians*, as they did most of their Law, for *Demosthenes*, their great Lawyer, tells us, *in orat. nal. apisona- tis was et etrat totu edy peltas; edes de dia totu muov*, &c. Yet ordinarily, even the *Grecians* had their *σισαγγελος*, or Apparitors (as the *Romans* call'd them) who were the same with our Macers, *qui volentes vocabant recusantes urgebant.* The Mace used by these with us in the Justice Court, is an Iron Rod, which was the symbol of power, as appears by the ninth verse of the second Psalm.

The Coroner was a Officer, who took inquisition of Murders, in *corona populi*, the Laird of *Ednam* was the heretable Coroner in *Scotland*; but this Office is abloet now, except at Justice Airs, where the Coroner yet presents all Malefactors, and takes them to, and from Prison.

TITLE

God for God



## TITLE XVI.

The Jurisdiction of the Justices over  
Souldiers, and of Military  
Crimes.

- 1 When are the Justices Judges to Souldiers.
- 2 A Debate concerning Free-quarter.
- 3 Haddo's Case.
- 4 Sometimes Commissions are granted for trying Souldiers.
- 5 How Deserters are punished.
- 6 Who were Judges competent to Souldiers amongst the Romans.

I. **A**lbeit Souldiers should be tyed by a Court-martial, for Crimes committed by them, in a military Capacity, as deserting their Colours, resisting their Officers, &c. yet when they commit other Crimes, they are lyable to a Tryal before the Criminal-Court. For as *Voet* observes, *delicta militum sunt vel communia, vel propria, lib. 2. de re milit.* And thus *French*, and two other Souldiers under *Morgan* in the English Garison of *Leith*, were put to the knowledge of an Inquest, for killing a Burgeis of *Edinburgh*, albeit *Morgan*, offered to repledge them, *January 1662*, and yet in *anno 1666*. The Justices would not proceed against some Gentlemen, for the slaughter, because they were both Souldiers, but it seems the Crime should have been tryed before the Justices, seing the Crime, and not the persons determine the Jurisdicions, and their Crimes was only a Combat, which is no specifick Crime to Souldiers: and this is conform to a Decision, *Nov. 1627*. Where Captain *Bruce* having been pursued for killing Captain *Hamilton*, did petition the Council, shewing them that this Crime was committed in *Flanders*, and that he was assoilzied therefra by a Council of War, upon which probation the Council commanded the Justices to desist. But Sir *William Ballenden* being challenged before the Council, for many Ryots and Crimes committed when he was in the West, they would not remit him to a Council of War, albeit that Declinator was proponed. *August 1667*. And Militia Souldiers were judged by the Justices, for Murder committed by them in the execution of other Officers commands. the 3. of *February 1674*.

II. The most considerable Military Question, which I remember in all the adjournal Books: are first, that which was debated, 5. *Decemb. 1666*. The case whereof was, some West-countrey-men had formed themselves in an Army, and were declared Traitors by the Council, and being thereafter beat at *Pentland-hills*, Captain *Arnot*, Major *Mackulloch*, and others, were taken by some of his Majesties inferior Officers upon Quarter, but being pannelled before the Justices, as Traitors, it was alledged for them, that they could not be put to the knowledge of an Inquest before the Justices, because they having been modelled in an Army, and taken in the Field fighting as Souldiers, they behoved to be judged by the Military Law, and by that Law, such as get

Quarter in the Field, are by that Quarter secured therein for their Lives, and cannot be hereafter quarrelled. To which it was replied, that there can be no Quarter, but where there is a *bellum justum*, and it is not the Number, nor form of the Army, but the cause that makes *bellum justum*, and publick Insurrections of Subjects against their Prince, are rather Sedition, than *bellum*; and these Insurrections, being Treason, none can remit Treason but the King, and therefore Quarter could not be equivalent to a Remission, but all the effect of Quarter in this case, is to secure these who get the same from present death. To which it was duplyed, that all who get Quarter from any who are authorized to be Souldiers, are by that Quarter against that Authority from whom these Souldiers derive their power, and these who get the Quarter, are not to dispute whether these Souldiers had a sufficient power to give Quarter, or whether *bellum* be *justum* or *injustum*, for that were in effect to destroy Quarter in all cases, and to make all such as take up Arms, to be desperat & irreclaimable; and the power of giving of Quarter is naturally inherent in all Souldiers, as such: and as the Council, without expresse Remission from the King, upon submission might have secured their lives, so might Soldiers by quarter, for they have as much power in the field, as the others at the Council table. 2. Lawyers are very clear that quarter should be kept, though given to subjects, who are Rebels, *Grotius lib. 3. Cap. 19.* where after he hath fully treated that question, *de fide servanda*, concludes, that *fides data etiam perfidis & rebellibus subditis est servanda.* And this hath been observed in the Civil Wars in Holland and France, and by his Majesty, and his Father at home, during the late troubles. 3. Quarter is advantageous to the King, and so should be kept, for these who are taken, might have killed his Majesties General and Officers, and by giving quarter to his enemies, he redeemed his Servants; and if the only effect of quarter, were to be reserved to be a publick tryal, none would accept quarter.

Notwithstanding of which reply, the defence was repelled, and the Pannels condemned, and thereafter execute.

The second question was, that which was debated in *Haddoes case*, 16. March 1642. At which time that Loyal Gentleman *Haddo*, being pursued, for killing Mr. *James Stalker*, Servitor to the Lord *Frazer*, he alledged that the said Mr. *James* was killed in the open field, in a Conflict betwixt the Covenanters, and Anti-Covenanters: All which Acts of hostility were remitted by the pacification. To which it was replied, that the Pacification did only secure against Acts of hostility, which were done *in furore belli*, but this was a privat Murder; for the said Mr. *James* having been taken a Prisoner, *Haddo* did come up to him, and asked whose servant he was, and hearing that he was servant to the Lord *Frazer*, he said, your Masters man is the person that I am seeking, and thereupon ordered to kill him, which was accordingly done; by which it clearly appears, that this was a privat murder done in cold blood and upon premediat malice, and Mr. *James Stalker*, being a Prisoner, any who killed him, was liable for his Murder, *ex jure militari*, and the pacification could no more defend the committer, than if he had gone into prison and killed a prisoner, or if he had committed a Rapt upon a Woman; like as Murderers are expressly excepted from the pacification, 2. *Haddo* was no general person; and so could not give order for his Execution; and so the killing of the Defunct was not warrantable by the Law of Arms. To which it was duplyed, that the Pacification did secure against all deeds whatsoever done upon the Field, by persons engaged in either party, without debating, whether the Deed was lawfully or unlawfully done, and the occasion, and not the manner of killing, is to

be

be considered. And as to the Manner, it is answered, that Mr. *James* had never got any Quarter, and so was not a Prisoner of War; and therefore might have been killed by any engaged in the quarrel, whether General person, or other. But the truth is, the said *Haddo* did command that Party, which was equivalent to his being a general Person; and albeit the Pacification did expressly except Murders, yet they behoved only to be interpreted of such Murders, as had no contingency with the Troubles, nor were occasioned by them: this Debate was not decided, but was remitted to the Parliament; and that worthy Gentle-man executed, for rising in Arms against the Estates of Parliament.

III. I find, that there was a Commission granted by the Parliament, in Anno 1644. to two Baillies of *Edinburgh*, to sit, and hold Justice Courts, upon such Souldiers, as were Run-aways, and that upon this Commission, *James French* was condemned by them, for running away from his Collours, contrary to the Act of Parliament 1644, and was hanged accordingly. From which, these Observations may be made, 1. That the Justices are not Judges competent to Crimes, that are meerly Military. 2. That we have no standing Law for executing Run-aways, beside the Martial Law; nor was this Inditement founded upon any Law, except the Act of Parliament 1644, which is now abrogated. 3. It is observable, that one Mr. *Alexander Henderson*, as Procurator Fiscal, and not his Majesties Advocat, was here Pursuer. From all which, it seems some-what strange, that this Process should have been insert in the Adjournal-Books.

IV. But albeit Deserters were here punisht with death; yet *regulariter milites gregarii*, or listed Souldiers, are only punishable in time of Peace, with Degradation; and in time of War, with Death, because the hazard is then greater, *l. 5. §. 1. ff. de re milit.* and by that Law they may be killed by any man. *l. 2. Cod. quando liciat. unic. &c.* But this arbitrary killing is not now in use, as *Voet de jur. militat.* very well observes, if Superior Officers leave their Charges, they commit Treason, *l. 2. ff. ad leg. jul. majest. vid. tit. Treason.*

V. *Constantine*, having extinguisht the Office of *praefectus Pratoris*, who was the supream Judge in all Military Cases, The *Magistri militum* succeeded, and were sole Judges of all Crimes committed by Souldiers, both in Civil, and in Military Cases; and if Souldiers had offended, the civil Magistrat might have secured, but he was obliged to remit them, *cum elogio*, to their own Officers, *l. 9. ff. de custod. reor. vid. tit. C. de re milit.*



# TITLE XVII.

## Advocations of Criminal Causes.

- 1 *Advocations defined.*
- 2 *No Advocation from the Justices.*
- 3 *How Advocations are raised from inferior Courts, and the Forms thereto relating.*
- 4 *The ordinary Reasons of Advocations examined.*
- 5 *Whether the Justices are proper Judges to their own competency.*

I. **A**dvocation is the away-calling of an intended Cause, or pursuit, from an inferior, incompetent Judicatory, to a higher, and more competent; and is the same thing with us, that *rechusatio judicis*, was with the Romans, and is by the Doctors, call'd *advocatio*, or *evocatio*, which is by them defined to be, *litis pendentis, coram inferiore ad superiorem absque provocacione facta, translatio*. Gail. lib. 1. obs. 41. num. 7. and is founded upon *cap. ut nostrum de appell. & l. jud. solvitur ff. de jud.*

II. There is no Advocation raised of Pursuits, intended before the Justices, but if there be any design of stopping a pursuit depending before them; there useth to be a Petition given in to the Lords of Secret Council, who, if they find the desire of the Petition just, will ordain the Justices to stop all further procedure, or will remit the inquiry to any other Court, as they did in a pursuit, intended at the instance of the Earl of Caithness, against some Vassals of the Earl of Sutherland, which they stop, as to the Earl himself, and ordained his Vassals to be pursued before his own Regality-Court: sometimes also, they ordain Assessors to the Justices, so that there is never a Cause formally Advocat, from before the Justices; albeit those Courses, and Repledgiations be equivalent to Advocations.

III. Advocations may be raised from inferior criminal Judges, by the Lords of Session, as in the case of Theft-boot, before the Sheriff of Inverness, and Advocat by the Lords, because of the intricacy of the case; albeit, it was alledged there, that the Lords were not Judges competent, in such Advocations, because they could not be Judges to the Crimes pursued. To which it was answered, that though they could not be Judges themselves, yet they might remit the pursuit, to those who were competent; even as Brieves raised, for serving a person Heir, may be advocat to the Lords, who may remit the case to another Inquest: But Durie observes, the 9. of January 1629. that Kincaid of Waristoun, craving that the Process against him, for slaughter, might be advocat by the Lords, to the Justices, because of the ignorance of the Barron-Baillie, or else that they would grant Assessors; the Lords continued the Dyet, till Application should be made to the Council, but if the Council would not interpose, then they should do Justice therein, by remitting the same to the Justices, or otherwise. But Advocations in criminal Cases, are ordinarily raised by the Privy Council, who have the most natural power in such cases.

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Advocations are raised upon Bills, and the Letters pass the Signet of the Session, if the Bills be past by the Lords of Session ; or of the Council, if the Bill be past by the Lords of Council.

This Advocation must be execute by a Messenger, and a full Copy must be given of the Letters, as in other Summonds ; for in effect, an Advocation is a Summonds, and the Dyets in Advocations are peremptor, as in all other Criminal pursuits: Neither is the Advocation given up to see, as in other Criminal Pursuits, at the day of compareance; and therefore a full Copy should be given, to the end, the Defender may be ready to answer. The pursuer of the Action must be cited, and the Judge from whom the Action is to be advocat, must be also cited, to the effect, he may defend his own Jurisdiction; and if both these be not cited, the Advocation will not be sustained.

When the day of compareance comes, if the Advocation be raised before the Session, it is called before the Session, and if the reasons of Advocation be found relevant, the Cause is remitted to the Justices; but, if that Advocation be raised before the Council, it is called before the Justices, and they are Judges to the relevancy of the Reasons, and both Pursuer and Defender, must prove all that they alledge instantly.

The Advocation of a Criminal Pursuit, doth contain the Reasons upon which it is founded, as in civil Advocations; but though *in civilibus*, the Raizer of the Advocation will be allowed to add a Reason, though it be not libelled, which is called an eiked Reason; yet that is not allowed *in criminalibus*, because all must be proved *instante*, and the Defender is not able to prove his Answer instantly, if he know not what is the Reason, which he must answer, whereas, *in civilibus*, he will get a Term to prove his Answer, to the eiked Reason.

IV. The ordinary reasons of Advocation, are, 1. Consanguinity, or Affinity within degrees descendant, *viz.* cousins german, or nearer, for whatever is a sufficient reason to cast a Witness, should ( in my opinion ) much more be sufficient to decline a Judge, since there may be penury of Witnesses, so that the Witness challenged may be necessary ; whereas, if a Judge be suspect, he may be supplied by another Deput, or a Superior Judge ; and a Judge may by himself, ruine a Cause, which one Witness cannot do ; and though we have no express Law for this, yet the Lords incline ordinarily to sustain this, and particularly in the Moneth of December 1676 *Ross contra Collo dine*, where a Decreet was turned into a Libel, because pronounced by a Nephew, albeit it was there alledged, that by the 212. *Act 14. Parl. 3. 6.* a Brother, Father, and Son, were only to be declined as judges : for that Statute relates only to the Lords of Session, who, because of their great Eminency, and Trust, are not to be as easily suspected as inferiour Judges.

It may be doubted, whether the Justices, or any of them, may be declined as within Degrees descendant ; for though they must now be Senators of the Colledge of Justice, yet they sit not there as such, nor are the Justice general, or Justice Clerk alwayes of that number ; but yet I think, that since the Justice Court is a supream Judicatory, in its own kind, and that this respect that is put upon them, is, because of their eminency, and presum'd integrity, that therefore they being the same persons, ought to have the same priviledges, and the Justice general, and Justice-Clerks being superior in order to the Lords of Session, who are Justiciars, ought at least to have as great Trust : But though the Admiral be a supream Judge also, yet it may be doubted, if this Statute should be extended to him ; because men of meaner parts may Officiat there.

It may be also doubted, whether this Declinator against Fathers, Brothers, and Sons, should extend to the Degrees of Affinity, as well as those of Con-

fanguinity, so that a Father, or Brother in Law may be declined, and though the Lords lately would not decline one of their number, though Brother in Law to the pursuer; yet it may be argued, that albeit Acts of Parliament must be strictly interpreted, yet where there is a parity of Reason, and the words may in propriety admit of the extension, there the extension is to be allowed; but so it is, that here a Brother in Law, is to be suspected, and a Brother in Law, is in propriety of speech, a Brother: Likeas, since Witnesses may be cast upon the suspicion of Affinity; why may not Judges? especially seeing in the Statute 1621. against dispositions made by Bankrupts: and in the opinion of Lawyers, degrees of Affinity, and Consanguinity are still equiparat, & so wise are we in this point, that a pursuite, at the instance of a Procurator-fiskal, was Advocat upon this Statute, because the Procurator Fiskal was Brother to the Judge, though he was only pursuing *ratione officii*, and had no interest himself, and expressly renounced all interest in the pursuit. 28, January 1629.

Whether this statute is to be extended to unlawful Relations; so that a Bastards Brother, &c. may be declined, *vide*, my observations upon the Statute 1621.

Another reason of Advocation like to this, is, that one of the members of the Court is pursuer; as for instance, the pursuite is at the instance of one of two Sheriff-Deputs, before his own colleague: *habet quippe Societas jus quoddam fraternitatis in se l. verum ff. prasocio vid. & insinuante de offic. deleg. & cap. Post. de appel.* and that none should Judge where the colleagues pursue; but that the pursuite should be carryed away to another Judicature, is appointed by a Statute in France, Anno. 1560. but we have no such Statute, and one colleague with us, may be witness for another, and why not then Judge.

A third reason of Advocation is, that the Judge is suspect, as if he had given partial counsel, or if he has repelled a just defence, or as being severe, above what the Law allows. 4. That he is incompetent, the case pursued being only proper to be tryed by the Justices as being one of the four Pleys of the Crown, *viz.* Treason, Murder, Fire-raising, and Ravishing of Women; but sometimes though the first Libel have inferred Treason, as in the case of Peddies, January, 1667. yet if the Pursuer will restrict his Action to damage and interest; but will desert the dyet as to the criminal pursuit it may be sustained. 5. That the case is very intricat, as in a pursuite of Theft-boot, which was Advocat from the Sheriff-deput of Inverness, *eo ex capite*.

Members of the Colledge of Justice also pretend, that they cannot be pursued before any other Court, because this would draw them from attending the Session, but the Act. 39. Pa. 6. Q. M. whereon this is founded, seems only to hold in Removings, so that no Action concerning Removings, should be Advocat, but in these cases, *viz.* deadly feed, where the Judge ordinary is party or the defender a member of the Session; and yet, *de praxi*, that part of the Statute is extended to all Advocations: but they cannot Advocat from the Justice-Court.

If the cause be Advocated, the pursuer of the first Libel, which is Advocated, must find caution *de novo*, to insist in the pursuite, else the Justices will desert the dyet, which caution is necessary, because the Judicature before which the caution was found, is altered, and neither the pursuer, nor his cautioner are bound to insist before any other Court.

The defender likewise of the first cause, and who raised the Advocation, is obliged to renew his Caution, that he will under-ly the Law, else the Justices will imprison him.

The raiser of the Advocation must intimat to the pursuer of the principal cause, that he has raised an Advocation, to the end, that the said pursuer may be ready to insist at the day, to which the Advocation is raised, and when the Procurator



rator Fiscal, is the pursuer before the Court from which the cause is Advocated, the raiser of the Advocation should intimat to His Majesties Advocat, to the end he may be ready to insist: for his Majesties Advocat is in the Justice-Court, what the Procurator-fiscal is in inferiour Courts: The Office of both being to pursue *judicium publicum*.

V. The old custom was (as some alledge) that the Lords of Session judged all the Advocations, which were raised in Criminal Causes, from inferiour Judges, even to the Justice Court; and very judicious Lawyers do yet hold, that the Justices cannot judge, whether they be competent Judges in causes Advocated from Inferiour Criminal Courts, but that the Lords of Session should cognosce, whether the cause should be Advocat, and if they sustain the reason of Advocation, that they should remit the cause to be tryed by the Justices, or remit the tryal to the Court from which it was Advocated; if the reason of Advocation be not relevant: for they think it unreasonable, that the Justices should be Judges of their own competency; but since the Justices are supream & soveraign Judges, as well as the Lords of Session, and since the Justices are now many, and are Lords of the Session also, it seems reasonable, that they should be Judges to their own competency, especially since these reasons of Advocation do very frequently dip upon Subtilties of the Criminal Law, and cannot be well judged, but by such as understand that Law exactly: as for instance, I have seen an Advocation raised of a Libel in the case of Treason, from before a Lord of Regalries Court, upon this reason, *viz.* that the ground of the accusation was for drowning a Coal-heugh, which was Treason in our Law, to the which crime of Treason, none but the Justices were Judges competent. In which Advocation these points were necessarily debated, 1. Whether Lords of Regality were judges to Treason. 2. Whether though they were Judges competent to Treason, founded upon the common Law, yet if they were Judges to Statutory Treason. 3. Whether though burning a Coal-heugh was Treason by Statute, yet if drowning of it fell under that Statute: all which points were *indagationis criminalis*, and these who could judge such points, might judge any criminal case: Likeas, both by the old and new stile of Advocations, raised either by the Council, or Criminal Court, the Letters bear, that the reasons are to be seen, and considered by the Justices, and immediatly upon the Advocation, caution is found in the books of adjournal, and to answer before the Justices, and the Justices have been in constant possession of judging such reasons.

And whereas it may be alledged, that though the Lords of Session are not Judges to Crimes; yet the case of competency, in the matter of Jurisdiction is meerly Civil, and so it would seem proper to be judged by the Lords, especially since it is not just, that the Justices should be Judges in their own cause. To which it may be answered, that though this case be Civil, yet it has so necessary a contingency with what is criminal, as I have observed, that they ought not to be divided, since the Lords of Session are Judges competent to Advocations, wherein their own Jurisdiction is controverted; Why should this be denied to the Justices, who are a part of themselves, and such supream Judges are above suspicion, especially since they can gain nothing by their Jurisdiction.

# TITLE XVIII.

## Of Inquisition.

- 1 The nature of Inquisition, and when it is competent.
- 2 The King and Party may pursue separatly.
- 3 Citations, super inquirendis, when competent.

I. **W**Hen a Crime is committed, the Council, or the Justices, did of old take a previous Inquisition of it, by examining Witnesses, and taking such other information; as they thought fit: And these depositions, and examinations, are called *informationes* by the Doctors; but though they may examine Witnesses, before the intending of a criminal pursuit: yet after it is once intended, the Justices found the 8. of January 1672 that they could not examine Witnesses; for the Inquisition ends by the intending of the pursuit, & *ubi incipit accusatio desinit inquisitio*.

The Doctors are very profuse on this subject, but I shall only excerpt from them, what is most suitable to our forms and practice; they define Inquisition to be an Information of the Crime, taken by the Judges own authority, & *ex officio*: and they divide it in a general Inquisition, which is taken of the Crime in general, without taking notice of any particular Informer, or Defender. And a special Inquisition which is taken against a particular person, of whose guilt they are informed. By the Civil Law, no Judge could proceed against any privat person, without an accuser; for Inquisition was by that Law, an extraordinary remedy, and no recourse could be had to an extraordinary remedy, till accusation, vvhich was the ordinary remedy, were first tryed. But by the Canon Law, Inquisition was declared to be an ordinary remedy: and all the Doctors conclude, that generally, a Judge may now, by the practice of Nations inquire, *ex officio*, in all Crimes, *Farin. de inquisit. quest. 1. num. 10.* which is consonant to our Law; by which the Council, or Justices, may inquire into all Crimes, without vvaiting for an Accuser, vvhich is done vvith us, vvithout citation of the party, or other formalities: but nothing can follow, till after information betaken, an Inditement, or Summonds be raised, which is followed according to the ordinar rules. But yet I think, that the Judge should not enquire, or take any previous tryal, even in our Law, where an accuser offers to insift; except he has just reason to fear collusion, for *non recurrendum est ad extraordinarium remedium dum locus est ordinario*: and albeit Inquisition be declared by the Doctors, to be an ordinary remedy, yet it is only declared so, to the effect, that a Judge may inquire, without any accuser, and that the Inquisition so taken, be not *ipso jure* null; but naturally, every man should have liberty to pursue the privat wrong done to himself, which may be prejudged, either by the vvant of Information, or Zeal of the Judge ordinar and sometimes by collusion; And thus I have seen many Decrees, of Inferiour Courts, vvherein the Defender vvas by collusion, fined at the Procurator-fiskals instance, reduced by the Lords, and not sustain'd by the Council; vvhen it vvas alledged, that the party vvronged appeared, and offered to pursue, but it vvas not admitted. And albeit, because of the vvrong vvchich is done to the publick, a Judge may likewise inquire: yet he vvho is principally vvrong'd, should be allow'd to be chief in the prosecution. And therefore, albeit the Council

Council may in publick Crimes, where the peace of the Countrey is chiefly concerned, take Precognition of it, and stop Accusations, raised before the Justices, at a privat parties instance, as they did in the pursuit, at the instance of the *Stranaver* men, against the Earl of *Caithness*. And others for Fire-raising, and Depredations, in *August 1668*, yet they refuse to stop Accusations, and will not grant precognitions, in privat Murders, or such like Crimes, where privat persons are principally wronged; except the rigour of Law require some abatement.

II. It appears also, that Pursuits at his Majesties instance, are only subsidiary *Ja. 1. Par. 13. cap. 140.* by which Act it is clear, that Crimes may be punished at the Kings Majesties Instance, if no privat follower appears, and *Ja. 6. Parl. 11. c. p. 76.* Where it is Statute, that the *Theasurer*, and *Advocat*, may pursue privat Crimes, although the Parties be silent, or would agree. From which Acts, two things may be concluded, 1. That of old it was doubted if the King could pursue privat Crimes, without an Accuser. 2. That Pursuits at his Majesties instance, for privat Crimes, are yet only subsidiary, and allowable, if parties be silent, or collude. Which Distinction, doth in my opinion, solve that great Debate amongst the Doctors, *utrum accusatio cessare facit inquisitionem.*

*Nota*, That albeit by the said Act, it is Statute, that the *Theasurer*, and *Advocat*, may pursue without concurrence of the Party; yet *de practica*, the pursuit is only raised at the *Advocats* instance, and so the Particle (*and*) seems to be disjunctive, as *and* is very oft in the Civil Law; and it is probable, that a pursuit at the *Theasurers* instance, would be sustain'd, without concurrence of his Majesties *Advocat*, if the *Advocat* should refuse his concurrence.

III. The Doctors conclude, that a Judge cannot enquire summarily, *& successu est ut, vel indicia, vel delator, vel diffamatio aperiant viam inquisitioni*, for else every Judge might diffame the best and most innocent men, at their pleasure; so that if a Judge have not some rise for his Inquiry, I really believe he is punishable in our Law, for putting a person to Inquisition for a Crime, *& sit judicandus est ex eo capite*, but the malice of the Judge must be very clearly proved in that case.

Of old, Judges did appoint Delators, who might inform, *denunciatores discibantur*; but of late, this imployment doth belong to the *Fisk*, *& ejus syndici*. And by our Law, to his Majesties *Advocat*, in the Justice-court, and to the *Fiskal*, in inferior Courts, and they may pursue, or inform in Inquisitions, *sine pena calumnie quia cessat in iis suspicio calumnie ex eo quod denunciant ex officio.*

By the *13. Act. 10. Par. Ja. 6. Charges super inquirendis*, are discharged, but it is a mistake to think, that by that Act, the King, or other Judges, cannot examine men, without a formal Process; for the design of that Act, is only to discharge the denouncing men Rebels upon such Charges, without previous Tryal; and yet if the chief Officers of State, or at least four of them concur; it would seem that by that Act, even such Charges are yet lawful. And where the King, or Magistrat has previous information of Crimes latent, it were against the Interest of the Common-wealth, that they should not be allowed to clear themselves of these, by particular Interrogators.



## TITLE XIX. Of Accusations, and Accusers.

- 1 The difference betwixt an Accusation by way of Summonds, and an Inditement.
- 2 Who may accuse, by our Law.
- 3 A Minor cannot pursue without the consent of his Tutors and Curators.
- 4 In what cases a Woman may pursue.
- 5 Whether a person excommunicated, or at the Horn, may pursue.
- 6 Infamous persons cannot pursue, and who are such.
- 7 Whether more Crimes may be pursued at once.
- 8 The Pursuer must find caution and be punished, if he be calumnious.
- 9 The Pursuer must aliment.

I. **A**fter Inquisition is taken ( which is not necessary, but is still arbitrary with us ) the party is either imprisoned, and then he is proceeded against by way of Inditement, or he is still at liberty, and then he is proceeded against by a formal Summonds. *Inditement* comes from the French, *enditer*, *deferre nomen alicujus*, and by the Law of England, it differs from Accusation, in that an Inditement must be always at the Kings instance, and is but a Bill, and the preferrer of the Bill is no way tyed to the Proof of it, upon any penalty, except there be Conspiracy, *vid. Blunt. dist. Angl. verb. enditement*. But an Inditement with us, is a Scedule containing the Accusation given to the Defender, so called, as *Skeen* says, from the French word *dict in* what sayest thou? for after the Inditement is read, the Judge asks the pannel what he can answer to it; and it differs only from a Libelled Summonds in that it begins thus. *A. B. Ye are indited and accused, that albe it by the Laws, &c. yet, ye, &c. or thus, forasmeikle, as by such particular Acts of Parliament, &c. Murder, &c. is prohibit, and the pain declared to, &c. yet you, A. B. did upon the 27 day, at least Moneth, &c. And it is writ only by the Justice Clerk, without a Bill, and passes not the Signet, nor needs it be executed with the Solemnities requisite in Libelled Summonds by Messengers in ordinary Crimes, and Heraulds in Treason, but may be given by the Clerks Servant; as was found in a pursuit of Treason, pursued by way of Inditement against *Mackulloh, Gordonn*, and others, 5. December 1666. it needs not likewise these, *inducias deliberatorias*, allowed to such as are at liberty, and are pursued by a libelled Summonds, but a day or two is sufficient and sometimes they may be pursued without any time to be allowed, for this procedure is in effect the same with that Inquisition specially treated of by the *Civillians*.*

There is likewise this difference betwixt an Inditement, and an Accusation, that an Inditement properly is a Libel raised at the Kings instance, & not at the instance of any privat person; for in Accusations, or Libels raised at the instance of privat persons as pursuers, there must be a formal libelled Summonds under the Signet, *so cap. 1. R. M. lib. 1. num. 7. & 8.* It is said, that Theft and Murder by Inditement belongs to the Justice, because there the King or his Advocate pursues, but where a certain accuser appears, a pursuit upon these Crimes may be intended before the Sheriff, and *Skeen* upon that Chapter, and likewise

wife upon the 2. cap. num. 2. *David Stat.* 2. does observe, that all Criminal Accusations are either by an Inditement, or by a certain Accuser; and from this difference ariseth that other difference, that *crimen per indictmentem*, is only puruable before the Justices, which is clear both by the forecited places, and the whole tract of the Books of *R. M.* But this last difference is now obsolete, for of late before the Sheriff, or at inferior Courts, Malefactors may be pursued either by a libelled Summons, at the instance of any particular Accuser, or at the instance of the *Procurator-fiskal*, by way of Inditement; which practise is most reasonable, for it were against the Interest of the Commonwealth, that Sheriffs, and inferior Judges, whose great Duty, and chief Employment it is, to advert to Crimes, should not have liberty to pursue, without the concurrence of an Accuser.

It is indeed the Interest of the Common-wealth, *ne crimina manean impunita*. And therefore in Crimes which immediately concern the welfare of the State; such as Treason, Sedition, &c. every man may be an Accuser, but it is likewise the advantage of every privat person, that it shall not be lawful to every malicious Enemy, upon the pretence of a publick good, to trouble and vex such against whom they carry malice, upon a pretence of a criminal pursuit, and threore according to the Common-Law, *in privatis delictis non admittebatur ad accusandum, nisi qui suam aut suorum injuriam insequeretur*: and *Farinac.* states *suorum injuriam*, to extend, *ad quartam gradum*, and it seems to be extended with us within degrees descendant, and that every person may not in our Law, pursue any privat Crime, appears from the former Chapter.

III. A Minor may not by the Civil Law accuse, without the consent of his Tutors and Curators. And where it is said, *l. 4. R. M. c. 2.* that a Major being of lawful age, he may accuse, it insinuates, that Minors regularly cannot accuse.

And suitable to this, the Justices refused to grant process, at the instance of *William Umphray*, against *John Meldrum*, because the said *William* was Minor, and had no legal concurrence, 29 of July 1597, which is founded upon most convincing Reason, for Minors may by ill governed youth, and imprudence, either pursuing unjustly such as are most innocent, or else by managing unwisely the criminal Pursuit, if it were competent to them, they might prejudice both themselves and the Common-wealth, in suffering the Defender to be cleansed by a Verdict. After which Absolvitor the Defender could not be again brought to a Tryal, nor would the Minor be restored against the Sentence, and yet a Minor may crave at the Bar, that the Justices would allow him Curators, *ad litem*, which desire, the Justices will grant, 24. July 1602. *Speré contra Bannatine*.

IV. A Woman according to the Civil Law, could not accuse in no case, except where she was revenging the Injury done to herself, Husband or Relations; and in the former Chapter it is said, that a Woman can accuse none of Felony, except in such particular cases, which appears to be by the 5. chap. num. 8. the Murder of her own Husband, *quia n. a raro fuerunt vir & uxor*, & N. 9. it is generally ordained, that a Woman may be allowed to pursue any injury done to her own Body. From which we may generally conclude, that she may pursue, *suam sed non suorum injuriam*, wrongs done to her self, but not wrongs done to her Relations.

V. Whether a person at the Horn, or excommunicat, may pursue, appears to be debateable, for the one opinion it may be alledged, that it is for the Advantage of the Common-Wealth, that Crimes remain not unpunished. 2. Civil Rebellion, or Excommunication, *non tollunt jura natura*, amongst the chief whereof, Lawyers esteem the liberty of pursuing the Wrongs done to Relations, and much more the Wrongs done to ones self, in his person or

good name. 3. Such as are Rebels for civil pursuities, *non possunt impune offendere*, and therefore it appears most reasonable, that they should not be debarred from pursuing Wrongs done them; for if a person at the Horn, could not pursue the Wrongs done him, then any person might injure him at pleasure, seeing the fear of Pursuit, and the punishment depending thereupon, is that which ordinarily overaws the Pursuer; but on the other hand, it may be alledged, that, 1. By the 11. cap. Stat. Will. These who contemn the Statutes of the Church, shal not be admitted to accuse. 2. It is a Rule in Law, that *frustra legem implorat qui contra legem peccat*. 3. A person at the Horn, is by the English Law, always and oftentimes in our Law, said to be outlawed, and to be outlawed, imports the losing of all the priviledges of Law; and in our Law, they are said, *non habere personam standi in judicio*. Nor puts our Law any distinction betwixt Civil and Criminal Causes: for reconciling which difficulty, it may be alledged, that there is a distinction betwixt the being outlawed for a Criminal or Civil Cause, and that these who are denounced Fugitives upon any Criminal accompt cannot be pursued till they be relaxt, which is in contravertedly true in our Law; seeing if a person be denounced for not finding Caution for his appearance, to underly the Lavv, he will not be admitted to propone any Defence till he be relaxt; but though a person be at the Horn for a civil Cause, it appears most unreasonable, that because a person is not able to pay a great Sum, for which he is denounced, that he shal not therefore be admitted, to defend his own innocence against a Crime laid to his charge. It seems likewise reasonable, that some distinction should be made, betwixt a Pursuer and a Defender in this case; for it seems unreasonable, that he who accuses another for a Crime, should debar him from self-defence, though the debarring him from pursuit, be not so unfavourable; and upon this account, in a case betwixt *Ninian Spence* and *Hector Bannatine*, the Justices found, that the Pursuer in a Criminal pursuit, could not by Horning debar à *defendendo*, the person whom he himself had called. It may be likewise alledged, that though the King's Advocat may debar a Pannel from his defences, when he is at the Horn, that no privat party can, seeing they are not prejudged by the Rebellion, as the Fisk is; but this last distinction, is rather reasonable than legal, and therefore I mention it rather as a good overture, than a standing Law.

VI. Infamous persons cannot accuse, according to our Law, and what persons are accompted infamous, is particularly enumerat in the foresaid 11. cap. Stat. Willielm.

1. *Infames dicimus omnes illas personas esse, qui pro aliqua culpa damnantur notabili.*

2. *Et omnes qui christiana legis normam abjiciunt, & Ecclesiastica Statuta contemnant; omnes fures, sacrilegio.*

3. *Omnes capitalibus criminibus irretitos, Sepulchrorum violatores, Apostolorum, Successorumque eorum & Reliquorum Sanctorum Patrum, libenter, violantes Statuta.*

4. *Et omnes qui adversus Patres armantur, qui in omni mundi parte, infamia notantur.*

5. *Similiter incestuosos, perjuros, homicidas, receptatores malefactorum; adulteros, raptos, maleficos, de bellis publicis fugientes; & qui injusta vel indigna sibi petunt loca teneri; aut sacra Ecclesie auferunt facultates; & qui accusant, & non probant, & qui contra innocentes principum animos, ad iracundiam provocant, & omnes qui pro suis sceleribus, ab Ecclesia expelluntur.*

6. *Et omnes quos Ecclesiastica, & seculares leges infames pronunciant: Item servos ante legitimam libertatem abeuntes, publice penitentes, bigamos,*  
omnes



*omnes qui non sunt integro corpore; qui sanam mentem non habent vel intellectum, qui furiosi manifestantur.*

7. *Hi omnes supra dicti, nec ad sacros ordines promoveri debent, nec ad accusationem, vel Testimonium admitti.*

VII. A person accused, was not obliged to answer of old, but for one Crime in one day, except there were several pursuers, *quoniam attachiamenta, cap. 65.* by which, accumulation of Crimes was expressly unlawfull, *sed hodie aliter obtinet*, for now there is nothing more ordinar than to see five or six Crimes in one Summonds, or Inditement, and to see one accuser, pursue several Summonds; and yet seeing crimes are of so great consequence to the Defender, and are of so great intricacy; it appears most unreasonable, that a Defender should be burdened with more than one defence at once; and it appears, that accumulation of Crimes is intended, either to lase the fame of the Defender, or to distract him from his Defence.

VIII. To the end that persons may not be unjustly pursued, the Civil Law did appoint two remedies, 1. That the pursuer should find Caution to insist 2. That he should be pursued, as a calumniator, if his pursuit was found to be malicious. As to the first, the form amongst the Romans, was, that the accuser was obliged, *deferre nomen rei apud prætorem atq; se inscribere libello judici porrecto vel in codice publico, quærela deposita cui inscriptione subscribebat & ad talionis pænam se obligabat incasum calumnie.* Inscriptionis formula apparet, l. 3 ff. de accus. Consulibus illis, die illo apud prætorem illum Titius professus est se Mæviam legem Fulvia de adult, ream deferre quod dicat eam, cum Seio in civitate illa domo illius, mense illo, consulibus illis adulterium Commisisse. Which inscription was only necessar in atrocious, but not in lighter Crimes, *nam illa de plano discutebantur, l. levia ff. de accus.* but in some cases the necessity of inscription was remitted, even in atrocious Crimes, as when a Woman, *suorum injuriam prosequitur & parentes filii necem & contra* And generally, where the pursuer could not be pursued for calumny, he needed not, *inscribere*, because, inscriptions were only necessar, to the end the pursuer might be punished, if he were found guilty of Calumny. Nor were these inscriptions necessar in Reconventions, *& antea categoriis*, because, in these, the pursuer intended not to calumniat, but only to defend himself, by recriminating the pursuit.

The inscriber was, according to the Civil Law, obliged to find caution, *se perseveraturum in accusatione usq; ad sententiam, l. 7. ff. de accus.* the reason whereof is by one of the Greek *Scoliaſts* said to be, *ἵνα μὴ εὐχρησὶ τις καθ' ὅσιν αἰσχροποῖ* *ne facile quis ad accusationem percurrat.* Suitable to this, our Law has ordained, that the pursuer, when he raises a Criminal Libel, shall find Caution to insist, in the intended pursuit; and this Caution is found, either by the Cautioner enacting himself in the Journal Books, which Act is to be subscribed by him, or else if the Cautioner be absent, he sends a Bond, bearing a clause of Registration in the Journal Books, which is accordingly therein Registrat; this Caution was first appointed by the 34. *As. Pa. 4. Ja. 5.* by which, the Justice Clerk is obliged to take sicker surety, that the pursuer shall bring back the Criminal Letters indorsed, and execute: but the Cautioner is not obliged with us (as he is by the Civil Law) that the pursuer shall insist, and the penalty appointed by this Act, is. an Earl, or Lord, two thousand Merks, a great Barron one thousand Merks, a Fermer five hundred Merks, an unlanded Gentle-man two hundred merks, a Yeoman two hundred Merks: But of old, accusers behoved to find Caution to insist, *Reg. Maj. cap. 1. l. num. 6.* and if he cannot find a Cautioner, it is said there, that his Oath may be taken, in all cases of felony, and the reason given, is, lest too much severity, in enacting of Caution, deter the prosecution of a publick Crime: and it may be

doubted, if *Cautio juratoria*, cannot properly come in under the notion of ficker security, and there can be little hazard to the Common-wealth, being the Law presumes, that His Majesties Advocat will be still so just, as to pursue the publick revenge, where the party is unable. Whereas, by admitting this, *cautio juratoria, ansa præbetur perjurio*, and the Defender is disappointed of his damage, and interest, if the party fail. By the 29. *cap. Stat. Robt. 3.* pursuers before the Sheriff, should still find Caution to insist; but with us, those *ubi suam vel suarum injuriam prosequuntur & etiam in antecategoriis*, the accuser must still find Caution; wherein we do very reasonably differ from the Civil Law, for the Defender is as much prejudged, and may be as easily troubled, if these pretexrs were allowed, to palliat the pursuers malice, as generally he could be in other cases: in this likewise we differ from the Civil Law, that the Defender is obliged to find Caution for his compearance, which he is commanded to do by the Letters: by which the Messenger is commanded to denounce him Rebel, if within six dayes after the Summonds is execute against him, he finds not Caution in the Books of Adjournal, to the effect foresaid; which Caution though it be found, yet if it be not intimat to the Messenger, the Messenger may still denounce him Rebel, for not finding of Caution. And though by the Civil Law, and ours, the Advocat may pursue without consent of the privat party: yet he is not obliged to find Caution, *nam in eo non præsumitur calumnia*: yet the Advocat in our practise, doth ordinarily oblige his informer to find Caution, else he refuses him his concourse.

If the accuser be found to have been calumnious, or as our Law terms it, in the wrong, he is obliged to pay to the party, an unlaw of ten pounds, *Jas. 3. Par. 6. Act.* And if there be moe deeds than one, he is liable in twenty Pounds; and likewise to pay the Defenders expences, *Act 78. Par. 6. Jas. 6.* Which Acts, speaks only of not prevailing, though there be no malice, and though there be no *probabilis causa litigandi*, but if their pursuit be found to be malicious it is arbitrary to the Justices, to inflict what punishment they please, either in that same sentence, wherein the Defender is absolved, or upon a separat Eill, or pursuute; as also, he is by the Justice constantly ordained to pay what damage, and interest, or expence the Justices pleases, both to the parties, and to the Assizers. And albeit, according to the Civil Law, *Procurator fisci non præsumebatur calumniosus*; yet *si procurator fisci calumnie instigat judicem ad inquirendum, tenetur in damna actione injuriarum & contumari debet, l. universi C. ubi causa fiscal, &c.* And according to the opinion of the Doctors, *hodie & judex & procurator fisci affectate consequentes crimen extraordinarie sunt puniendi, 2.*

IX. The Justices ordain, that because many poor persons were maliciously, or ignorantly imprisoned, that the Magistrats of *Edinburgh* should imprison none, but where one should find Caution, in the Books of Adjournal, to insist against them, and to alimnt them; and that they should appoint a Procurator, dwelling within *Edinburgh*, to whom the Justices might intimat, when they desire the pursuer might insist. the 3. of July 1661. which should be done, and exped very speedily; and for this end, the Bishop was appointed to visit the Prison every Friday and Wednesday *ut xxi. xxi. celeriter judicari. Basil. 21. de, Custod. reor.*

## TITLE XX.

## Of Advocats and Procurators.

1. Whether a Procurator should be admitted for the Pursuer in his absence.
2. His Majesties Advocat may depuie when he is Pursuer, he has also other Priviledges.
3. In what cases Procurators are admitted in defence.
4. What Oath of Calumny is allowed in Criminals.

**T**HE Doctors make a difference, *inter simplicem allegatorem*, who can only propone what is notour, as that the party cited is known to be sick; & *procuratorem*, who must have a mandat, and may propone declinators, or dilators; & *defensorum innocentia*, who not only can propone dilators, but may likewise defend; & *Advocatus semper reputatur defensor*, and needs no mandat, but his Gown is his warrant, and yet in Criminals he must have a Procuratory.

I. According to the Civil Law, Procurators were neither admitted to pursue, nor defend, *l. ult. §. ad vitem ff. de publ. jud.* but by the Law of most Nations, a Procurator is admitted to pursue; for *pena talionis* is now taken away, which was the reason the Pursuers personal presence was requisite. *Clar. fin. quæst. 14. N. 201* the Defender must still be present, *ne iudicium reddatur elosivum*.

With us, Procurators are admitted for the Pursuer, and yet this appears not to want difficulty, for if the Defender should desire, that the Pursuer should swear the Libel, the dyet would desert, if this were refused by the Procurator, and though in *Civilibus*, a day may be taken to produce the Pursuer, to give his Oath of Calumny, which Oath of Calumny is the same thing we call swearing the Libel in Criminals, yet seing all Criminal dyets are peremptor, so that there cannot be a day allowed to the Pursuer to give his Oath, it were unreasonable but he should be present, for else the Defender is precluded from a very great advantage, such as is the Pursuers Oath of Calumny, which if the Pursuer himself were present, and refused, no pursuit would be sustained at his instance, likeas, if the Pursuer were present, it might be referred to his Oath, that he gave the Witness good Deed, or that he knew the Defender to be *alibi*; by all which it would seem, the Pursuer should still be present; yet this was expressly repelled, 4. August, 1652. Where *Ballindalloch*, was pursuing *John Grant*, but there it was answered that *Ballindalloch* was one of the Pursuers himself, and the Remanent were his Servants.

II. Albeit the Kings Advocat be Pursuer in most cases, yet he uses ordinarily to constitute a Deput, vvho should produce a vvritten Warrant under his own hand, else cannot be admitted, and this Deput can desert a Dyet, though his Procuratory do not instruct him vvith a particular povver for that effect. 29. November 1638. Mr. *George Norvel* Procurator for Mr. *John Rollo*, vvwhich is constantly the opinion of the Doctors.



His Majesties Advocat uses not to pursue a Summonds of Treason, vvithout a special Warrant under his Majesties hand, or a particular order from the Council, vvhich he uses to produce *ante omnia*, and is still marked by the Clerk, as may be seen in all adjournal Books, but particularly in the cases of the Lords of Ochiltree, and Balmerinoch.

His Majesties Advocat, with us examines Parties, and Witnesses, before the Process be intended, which he doth upon pretext, that he may thereby know how to libel exactly, and to the end he may not vex parties, if he find no ground for the pursuit; but many learned Lawyers, have always thought this procedure dangerous; for his Majesties Advocat is still a party interested, and so should not be allowed to deal with the Witnesses; for thereby he may strain from them what otherwise they would not depone. And if in our last Reformation of the Justice-Court, it was found that the Kings Advocat should not make the Roll of Assizers, because he is too much interested, much less should he for the same Reason, be allowed to examine the Witnesses, since that is not allowed to the Advocats for the Defenders.

Advocats with us in Criminals are called Proloquutors.

3. No person should Plead or Consult in Reduction of Forefaulture, without leave granted by the King, *Aët. 135. Ja. 6. Parl. 8.* But in other Pursuits of Treason, no Advocat is obliged to crave a License, and even the foresaid *Aët.* is abrogated, *Aët. 38. Parl. 11. Ja. 6.* Which grants only liberty to plead in all Treasons pursued before the Parliament: but by the 90. *Aët. Parl. 11. Ja. 6.* Advocats are allowed before all Courts to plead, without license, and power is granted to Judges, to compel them to plead in such cases, and the former Restriction has been founded upon *C. falsis de panis.* in 6. where to plead for Traitors is discharged, *nisi concedatur licentia.*

When Advocats assist Pannels, especially in Treason, they use to protest that no escape of theirs in pleading, may be misconstrued; since what they say, is rather *ratione officii*, than *ex proprio motu*, as we see in Balmerinochs case; and it were hard to be severe in such cases to Advocats, since they are accustomed to much freedom, and are oftentimes transported by the heat of opposition, and zeal to their Client, nor would men have any to engage in their defence, against such pursuits, if this liberty were not allowed, and it is against reason not to allow it, where they are forced to plead, as they ordinarily are in cases of Treason, and yet if any Advocat will defend his own Escapes against Authority, he may be punished by Deprivation, but his punishment extends no farther, even where he speaks Treason, as was found in the Senat of Savoy, *Cod. fabr. tit. de panis defin. 19.*

By the Civil Law Procurators were admitted for the Defender, where the pain to be inflicted was not corporal, for the reason why personal presence was requisite, *viz.* That the Defender might undergo what was inflicted, did here cease, and yet with us, the defender must still be present, even where the pain to be inflicted is pecuniary, such as in cutting of green Wood, stealing of Bees, &c. Because the Certification of the Letters with us is still to compear to underly the Law, under the pain of Rebellion, and hath not those Words adjoyned, *or to show a reasonable cause*, which being added in Summonds, for civil Causes, is a sufficient Warrant, for the constituting a Procurator.

Noblemen, likewise might by the Civil Law, and the opinion of the Doctors compear by their Procurators, but this is not allowed with us. Procurators might likewise by that Law, be admitted to propone the incompetency of the Judge, even in the case where there is a Statute appointing the Defender to compear personally, which should much more be allowed with us, where

vvhether there is no such Statute, but vvhether this necessity is imposed by the will of the Letters: *Basil. tit. an. incrimin. num. 13. 14. Farin. de var. quest. 99. num. 168.* and yet I have seen those who killed *Armstrong* the customer, outlawed, July 1668. Albeit it was alledged, they dwelt within the Regality of *Annandale*, and so they should be repledged, which was repelled, because they were not present; yet the reason might be, because the Justices were Judged competent, *eo casu*, and the repledgiation was a privilege, with which the Lord of Regality might have dispensed, and so was competent only to him, and to the defender, who should have compeared, *in omnem eventum*.

Procurators are also allowed to propound excuses for absents, &c. *sine mandato*, *si excusationes illae sunt factae, & necessariae*, as is sickness, imprisonment, &c. *sed ad allegandum causas probabiles, & necessarias absentiae*, such as the want of a safe conduct, *requiritur mandatum; quia absens iis renunciare potest, & non constat de ipsius voluntate, nisi per mandatum*, which distinction, I think unnecessary; because it is always presumed, that the defender would willingly have himself defended; and with us, a Mandat is not necessary, if an Advocat be employed, for his Gown is his warrant: and where an Advocat is employed, I think, the Cautioner may be admitted, albeit he hath no warrant *quia qui satisfat dicitur habere mandatum de jure. Farin. ibid. part. 2. num. 283.* and the Cautioner defends himself, *eo casu*, seeing if the reason of absence, or *Essoinzie* (as we call it, be found relevant, he will not be unlawful, and where a Mandat is necessary with us, which is, where an Advocat is not employed) it may be doubted, if the Mandat be sufficient, if subscribed only by one Nottar where the party cannot write, which though it be ordinarily sustained, yet it would appear, that *eo casu*, it should be subscribed by two; for the Act of Parliament requires two Nottars, and four Witnesses, in all cases of great importance; yet seeing *qualibet levis probatio absentiae sufficit*, it would appear, that *quodlibet mandatum hic sufficiat*.

IV. Albeit where the pursuer is a privat person, he is obliged to swear the Libel, yet vvhether the Kings Advocat pursues, he is not obliged to swear the verity of the Dittay; because he pursues only, *ratione officii*, but I find, in the same Decisions, that the Advocat is not obliged to depone, vvhether the party hath given partial counsel, the 10. of *August* 1598. *Advocatus contra* the Laird of *Dalgely*, nor yet to declare vvhich is his informer, the 20. of *April* 1599. *Advocatus contra John Connel*, and others, but this seems unreasonable, seeing the Defender should not be prejudged, by the intending of a pursuit, at the Advocats instance; and *jure naturali*, the pursuer or informer, vvhich is all one, should not be a Witness, nor can it be known vvhich is pursuer, vvitheout the Advocat declare: it is also a great encouragement to unjust pursuits that any person may inform at random, without being known, and the informer is liable in damage, and interest, if he inform vvitheout any ground, even though the pursuit be only raised in the name of His Majesties Advocat, *AE* 78. *Parl. 6. Ja. 6.* but if the Advocat may conceal lawfully the informers name, then the Defender is precluded from all these just advantages. This privilege of the Advocats not swearing the Libel, seems to be founded upon the opinion of the Doctors, vvhich contend, that *Procurator ex officio non tenetur prestare juramentum calumniae*, *Gail. obs. lib. 1. obs. 88.*

## TITLE XXI,

### Of Libels, and the Forms of Process thereto relating.

- 1 *A Libel is a Sylogism.*
- 2 *It ought to condescend upon time, and place.*
- 3 *Whether the Qualities libelled may be passed from.*
- 4 *The Stile of a criminal Summons, and Inditement.*
- 5 *How a criminal Summons ought to be execute.*
- 6 *Whether a person who is banished, may safely appear before the day, in the Citation.*
- 7 *How criminal Actions are to be called, and the Forms thereto relating.*

I. **A** Libel is generally by Lawyers thought to be a Sylogism, wherein the Proposition ( as we call it ) is founded upon the Law, and though the Proposition be oft-times generally conceived thus, that albeit by several Acts of Parliament, the Crime of, &c. be expressly forbidden, &c. Yet it is more regular to express the particular Acts, whereupon the Proposition is founded. The Subsumption of the Libel, is the matter of Fact, which should condescend upon the Actors Names, and Designations, and upon the place where the Crime was committed, either expressly, as the House of such a Man, or *per coherentias*, as Lawyers speak, as that it was done near such a Hill, Water, &c.

II. That the place must be designed, is expressly required, *l. libellorum ff. de accus.* But whether the Day, or Moneth must be express, is more controverted; and by the *Formula*, express in the former Law, the Place and Moneth, are necessary, and to that *Formula*, is there subjoyned, thir words, *neq; diem neq; horam inuitus comprehendet*, but according to the opinion of the Doctors, if the Defender compare, and crave that the Pursuer should express the Day, because he offers to prove, *alibi*, when the Judge should force the Accuser to express the Day; for else the Defender would be precluded from proving his Innocence, *Bart. in l. is qui reus, ff. de pub. Jud.* But though in that case the Accuser is obliged to express, yet he is not obliged to prove the same; because the Expression thereof is not necessary, for the relevancy of his Libel, but only for the clearing of the others innocency, *Bertr. and lib. 6. Consil. 61.* As also, if the Pursuer can upon Oath depone, that he doth not remember the Day, and that he does not omit the same maliciously, *eo casu*, he is not obliged to express the same, *Clar. q. 12. num. 13.* But the former difficulty in this case still remains, which is, that the Defender loseth the benefite of this Defence, and is prejudged by his Accusers ignorance, which seems to be unjust: And therefore *Cook 7. rep. Calvins* case observes, that an Inditement should be most curiously, and certainly penn'd, and by the 37. *Stat. Hen 8.* the Day, Year, and Place must be insert. By the 80 *Ch. quon. attach.* these seven are to be express, the Names of the Parties, Day, Year and Place, Cause of the Complaint, and Damage. According to our Law, either the  
Crime



Crime is such, as depends upon time, as is the striking one in the Session-House, whilst the Lords sit; or the wounding, or killing one in time of Divine Service; and in these the particular time must be both libelled, and proved; because the time is not there a meer circumstance, but it is the *medium concludendi*; and therefore a Libel in Deforcement, was not found relevant, because it condescended not upon the time, since it was lawful, if the Rebel had been apprehended upon the Sabbath, 1671. but I think that this might have been proposed as a defence, and that the Libel without the Day, was relevant: but there also the Year was not insert, nor would the Justices allow the filling up the same at the Bar, as in civil cases; but in other cases, where the crime depends not upon time, we use to Libel in the Months of *May, June, July, &c.* or one, or other of the Months, Weeks, or Days of the said Months, but the expressing of the Day, is not found necessary, as in the case of one *Hay*, was found the 5 of *November* 1612. and likewise upon the 8. of *July* 1615. where a ditty of Theft, was found relevant though neither condescending upon the Day, nor the marks of the Goods: And in my Lord *Ayerly* case, the Parliament found it not necessary to condescend, even upon the Month, but the ordinary Caution allowed the Defender, in that case, is, that the Defender may offer to prove, that *quoad*, some particular Dayes of these Months, he was *alibi*, and *quoad* these, the Libel will not be relevant; nor he passe thereupon, to the knowledge of an inquest, but will get a precept of exculpation: as for instance, if one should be accused of killing a man, in the Month of *March*, upon the Street of *Edinburgh*, he might alledge, that *quoad*, the first fourth night, he was at *London*, *quoad*, so many other dayes thereof he was at *New-Castle*, &c. And if the Witnesses, when the Libel comes to probation, do depone, that upon any of these dayes the Crime was committed, in which *alibi* is proved, the Defender vwill not be thereupon convicted: For though the pursuer needs not condescend upon the Day, yet the Witnesses must condescend upon it, in the case vwhere *alibi* is offered to be proved, but other wayes it may be controverted vwhether a Libel be relevant, bearing in the general, the committing of the Crime, but not condescending upon the particular manner; as for instance, if it should be subsumed upon the Acts against forestalling and regrating, that the Defender did forestal, but did not condescend upon the particular persons, from vvhom the Corns were bought; or in usury, if the pursuer should not condescend upon the particular way how the Usury was committed; and in my opinion, *regulariter*, the Crimes should be particularly subsumed; because else the relevancy cannot be debated before the Justices, and the assize should be constantly judge of the matter of Law, and the Panel should be put off to the knowledge of an inquest, upon irrelevant Crimes, all which were absurd; but yet there are some Crimes, such as forestalling, and regrating, in which it is sufficient to libel the Crime; without condescending upon the particulars, for in this Crime it is declared by the 148 *Act. Pa. 12. K. J. 6.* that a Libel bearing common regrating, or forestalling, in the general shall be relevant, without condescending on the time, and way of committing the same. And accordingly upon the 11. *June* 1596. a Libel against *Towne* and others, for forestalling was found relevant, though it condescended not upon the particular persons against whom this Crime was committed: And it may be debated, that a person being pursued for common Usury, if that Crime of common Usury may be sustained without any particular condescention, because both the relevancy, and probation is referred to his own Oath, and so he is not precluded from any defence, but since it was necessary by a particular Law in regrating, to appoint the Libel to be found

relevant upon that general, it seems to follow, that regularly the particular way, and manner must be condescended upon; else that particular dispensation had not been necessary. Whether a conclusion be necessary in Criminal Libels, is likewise debated amongst Lawyers; but the common opinion is, that it is not, because though in Civil cases the pursuer may crave more, or lesse, than what is due to him, yet in Criminal, either the penalty is determined by a Law, which the Judge must follow, though it be not craved, or otherwise the pain is arbitrary, and there the pursuer cannot by his petition determine the same, but must leave it to the Judge, *l. 1. §. quorum ff. ad S. C. turpil. l. ff. de privat delicti l. ordine ff. ad municipalem*, and in the form set down *l. 3. ff. de accusatii*, by *Paulus*, there is no conclusion exprest, but yet with us, there is alwayes a conclusion in every Libel, though it be general, and I perceive that most of the practitioners are of opinion, that at least a general conclusion should be added.

III. Whether a Libel being libelled *qualificatè*, the pursuer may passe from the quality, has been thus determined by Lawyers, that if the quality amount to another different Crime, it cannot be past from, but if the quality amount only to an aggravating circumstance, it may be past from. As for instance, if the pursuer Libel upon the Act of Parliament, whereby murder under trust, is Treason, and subsume that the Pannel is guilty of murder under trust, in so far as the person murdered, was father to the murderer, if when the case is to be tryed, the pursuer should declare, that he insists against him as a Murderer simply, because he is not sure to prove, that the person killed was father: I think *eo casu*, the pursuer could not so reform or declare his Libel, for that makes the Crimes to differ, the one being Murder, the other Treason, and the Defender was only obliged to prepare him to defend against Treason, and finding that he was secure, as to the crime libelled, he needed not prepare other defences, or raise exculpations for that effect; but these qualities which amount only to aggravations, may be past from, as was decided, 11. Novem. 1672. For *Aikman* having pursued *Carnegy of Newgate* for oppression conform to the 25. Act 4. Part. K. 7. 5. because he had beat him, who was a Magistrate, in the exercise of his Office, the Justices having found, that the pursuer could not in the construction of Law be repute a Magistrate, because he had not taken the Declaration, it was thereafter alledged, that the Libel being only founded upon the foresaid Statute conceived in favours of Magistrates, and the conclusion being against oppression, and not against beating the pursuer, could no more insist upon that Libel, which was repelled, for the Justices found, that the beating any man, was a Crime, and the pursuer might insist against the Defender for beating him, since his being a Magistrate was only an aggravating circumstance: Yet this seems a hard decision, since the proposition of the Libel, did not bear, that beating was punishable, nor did the conclusion bear, that at least the Pannel was punishable for beating a free Lidge: and if this were universally allowed, alternative Libels were unnecessary, and this would occasion much looseness in Criminal Libels, whereas Lawyers treating of Criminal Libels, have laid it down as a principle, that in *criminalibus non licet vagare*, and the Crimes of oppression, and beating, are different. Nor can it be denied, but that a privat person differs from a Magistrate, so that this quality made the persons, the Crimes, and the *medium concludendi* to differ.

IV. For the better clearing of our custom in these cases, I have set down the form both of the Criminal Letters, and Criminal Indictment now in use with us.

## A Criminal Summons.

CHARLES, &c. humbly mean'd and complean'd to us, by our Lovits, A. the Reliſſ, B. Sister, Daughter, and neareſt Kinſ-woman, C. as Mr. with the remanent Kin of umquhile Main, Servant to the ſaid C. and our right Truſty and well beloved Counſellor, our Advocat, for our intereſt in the matter under-written upon Liſtoun, without any juſt cauſe, Offence or Injury done to him, by the ſaid umquhile Main, having conceived a deadly hatred, and evil will againſt him, with an ſettled purpoſe, and reſolution to bereave him of his Life, one way, or another, lately, upon the laſt day of where the ſaid Main was in quiet, and ſober manner for the time, expecting no harme, injury nor Purſuit of any perſon, but to have lived under Gods Peace, and ours. And the ſaid Liſtoun being bodden with a great Batton, or Rung in his hand, and with Knives and other invasive Weapons, firſt upbraided the ſaid Main with Words, alledging that he was a common Thief, and had ſtollen, &c. And thereafter, becauſe the ſaid Main had purged himſelf of that Calumny, and ſaid he was as honeſt a Man as himſelf, he thereupon ran and ruſhed the ſaid Main (being an aged man of 74 years of age) to the ground under his Feet, ſtruck him in the Head, Craig, Shoulders, and ſide, with the ſaid Batton, lap upon his Breſt and Belly with his Feet and Knees, beat him upon the Heart, and thereby broke, and bruised his whole Intrals, and Noble-parts, thereafter beaſed and drew him by the heels, off the ſaid Lands, by the ſpace of a quarter of a Mile, to a low Vault in, &c. and imprifoned him therein, tanquam in privato carcere, he being in the dead-thraw. Likeas, within three hours after his imprifoning in the ſaid Vault, the poor aged man dyed of the ſaid Stroaks and Hurts; likeas, to ſuppreſs the Murder, the ſaid Liſtoun with his Complices, buried him in an obſcure place in the Night time, & ſwa the ſaid Main was ſhamefully, and cruelly murdered, and ſlain, and ſecretly buried by the ſaid Liſtoun, and his Complices, and he is Art and Part thereof, committed upon ſes purpoſe, and proviſion, and forethought-fellony, in high and manifeſt contempt of our Authority and Laws, in evil example of others to commit the like; if ſwa be, OUR WILL IS herefore, &c. and in Our Name and Authority, Command and Charge, the ſaid Liſtoun, committer of the ſaid barbarous Murder, in manner foreſaid, to come and find ſufficient Caution, Surety to our Juſtice-Clerk, and his Deputs, aſſed in our Books of Adjournal, that he ſhal compear before the Juſtice, or his Deputs, to underly the Law for the ſamen in our Tolbooth in Edinburgh, on the day of in the hour of Cauſe, under the pain contained in our Acts of Parliament, and that ye charge him perſonally, if that he can be apprehended, and failzeing thereof, at his dwelling houſe, and by open Proclamation, at the Mercat Croſs of the Head-Burgh of the Shire, Stewartry, or Regality where he dwells, to come and find the ſaid ſoverty aſſed, in manner foreſaid, within ſix days next after he beis charged by you thereto, under the pain of Rebellion, and putting of him to the Horn, the whilk ſix days being by-paſt, and the Soverty not being found, that ye immediatly thereafter denounce him Rebel, and put him to our Horn, and eſcheat and inbring all his moveable Goods, to our uſe, for his Contempton, and cauſe Regiſtrat thir our Letters, with the Executions thereof, in the Books of Adjournal, within fifteen days thereafter, conform to our Act of Parliament made thereanent, and if he find the ſaid Soverty, intimation being always made by you, to us, of the finding thereof, that ye Summond an Aſſize hereto, not exceeding the Number of 45 perſons, together with ſick witneſſes as beſt knows the verity of the Pre-



*misses, whose names ye shall receive in the Rolls, subscribed by the Complainers, or either of them, ilk person under the pain of a 100 Merks, as ye will answer to us Ex deliberatione.*

*The form of an Inditement is thus,*

## AN INDITEMENT.

**F**Or sameikle as the abominable, vile, and filthy vice of Incest, being so odious, and detestable in the presence of Almighty God, and by the same eternal God, his express word so clearly condemned; Therefore our Sovereign Lord, out of his godly Disposition, and Zeal, by divers his Acts of Parliament, expressly Statute, and ordained, that whatsoever person, or persons, commits the said abominable Crime of Incest, shall be punished to the death, as the saids Acts of Parliament, in themselves propors: Notwithstanding, it is of Verity, that the said A.B. being married with his lawful Sponse, Daughte to C. most shamefully, but fear of God, or respect to our Sovereign Lords Laws, has given the use of his Body to D. his Wifes Sister, in the Moneths of \_\_\_\_\_ in his and her journeying, betwixt the Burgh of Edinburgh, and the Town of Elgin, and within the said Town of Elgin, in the which filthy, and incestuous Copulation, she has procreat a Bairn, committing there-through the said filthy Crime of Incest, and Adultery, to the high offence, and displeasure of Almighty God, violation of the Kings Majesties Laws, and evil Example of others, to run in the like filthy and abominable Vice, if the samen be suffered to remain unpunished, as at length is contained in the said Dittay, produced against him, &c.

V. The Summonds should be execute only by a Messenger at Arms, or by an Officer of the Court, except in the Case of Treason; in which case, it is appointed by the 125. *Act. Parl.* 12. K. 7a. 6. that Letters, and Summonds of Treason, should be execute only by Heraulds, and Pursevants, bearing Coats of Arms, or by Macers, which must be understood only of Macers of the Criminal Court; for the Macers of the Council, or Exchequer, or Session, cannot execute any other Summonds, but what is pursued before these respective Courts, to which they are Macers. The Form of the Execution, is, that there be a full Copy of the Letters delivered to the Defender, if he be personally apprehended, or if he cannot be personally apprehended, to his Wife, or Servants, or affix upon the Gate of his dwelling-house, if he any has, and Proclamation at the Head-Burgh of the Shire, where a Copy is likewise to be fixed at the Mercat-Cross; but if there be moe persons than two, and all be called for one Deed and Crime; in that case, two of the Copies are to be delivered, to two of the Principals, named in the saids Letters, or their Wives, &c. in manner foresaid, is sufficient. 2. *M. 6. Parl. cap.* 33. but if the Persons live in Shires, or Countreys, *ubi not patet, tutus accessus*, The Bill whereupon the Letters pass, use to contain a Priviledge, for citing them at the Head-burgh of the Shire, and to the end of the Letters, bearing thir words, and failzeing thereof, by open Proclamation, at the Mercat-crosses of our Burghs of, &c. because they are Broken-men, having no certain dwelling, and haunts, and frequents with other Broken-men, where our Officers dare not resort, for fear of their Lives, with the whilk Charge, swa to be given, We, and the  
Lords

Lords of our Council, by thir presents dispenses, and admits the samen to be as lawful, and sufficient, as if ilk one of them were personally apprehended, this is by the Doctors called, *citatio edictalis*, but if the Party be out of the Countrey, he must be cited at the Mercat-Cross of Edinburgh, Peir and Shoar of Leith, as in other cases. *Nota*, though the Act of Parliament foresaid, bear not a full Copy, yet it is absolutely necessar, that a full Copy be given; for the Dyets in the Criminal Court being peremptor, the Summonds is not given up to see, as in other Courts; and therefore the Defender should have a full Copy, that he may come instructed how to defend, and that he may timeously raise Exculpation, and if a full Copy be not given, the Executions have been found null, *in totum*, and the Acts of Parliament appoints they should be null, *Anno 1665. Livingston contra Leith*: And though some think, that in the case where a short Copy is given, the Summonds should be only given up to a short day; but the Execution should not be null; yet I think that Opinion is not sound. 1. Because, the Act of Parliament appoints the Execution to be null, where a Copy is not given. 2. The giving up to see, cannot be sufficient, for if the Party had gotten a full Copy at home, upon the place where he lives, he had raised Exculpation, and cited the Witnesses therefore upon the place. Thir Executions should be subscribed by the Executer, and stamped, and sealed before Witnesses, else they are null, *Act. 32. Par. 5. J. 3.* And Letters should not be direct generally, against Complices, but the particular Crimes of every Defender should be expressed, *J. 6. Par. 6. cap. 76. and Ja. 6. Par. 11. cap. 85.* And by this last Act, all Criminal Letters, which import tinsel of Life, and Moveable-Goods, when they are execute by open Proclamation, at Mercat Crosses, should be execute betwixt eight hours of the Morning, and twelve hours at Noon: Though formerly, when a Party was in Prison, his Inditement might have been given him upon 24 hours; yet it was found in the case of *Robertson*, in July 1673. that a Pannel in prison, should have fifteen days at least, that he might within that time, either raise a Summonds of Exculpation, or might take out diligences, for proving his Objections against Witnesses, or Assizes, and that conform to the eleventh Article of the Regulations, concerning the Justice Court, though it was alledged then, by His Majesties Advocat, that there was no expresse Warrant for that Indulgence, in that Article. And Correctory Laws, such as the Regulations were, ought not to be extended beyond the Letter; especially in this case, where the Pannel was a Murderer, taken with reid hand, and Justice was to be done against such, by our old Law, within twenty four Hours: which replies were repelled, in respect it was duplyed for the Pannel, that though the Law did not expresse the time that is to be indulged, to such as are Criminally pursued; yet it having exprest the reason, for which this Indulgence is to be given, *viz.* that the party might either exculpate himself, or cast the Witnesses, or Assizers, that were to be used against him, the Law could not but allow a time sufficient for doing that diligence, it being a Rule in Law, and a principle in Reason, that *quando aliquid conceditur, omnia concessa videntur sine quibus hoc fieri nequit*, and though where a party is taken reid hand, and confesses, the Judge ought to do present Justice upon him; yet that is only introduced to make Judges diligent, but not at all to preclude poor Pannels from their just Defences, and it were a thing very inhumane, and unwarrantable, if a poor pannel were taken reid hand, but could prove that he was forced to kill in self-defence; or if he could prove, that one of the Witnesses had been one of the Aggressors; that in either of these, or such like cases, he could not have time to cite Witnesses for that effect.

VI. Whether a person who is cited to compare in a criminal Court, as Defender, at a particular day exprest in the Summonds, may not before that day

day appear in *Edinburgh*, though he be banisht, was doubted, in the action pursued at His Majesties instance, against several Gentle-men, in *Anno 1674* and that they might come to *Edinburgh*, was allowed; because being cited, they were commanded to come. 2. Their coming to Town was necessary, in order to their defence, and thus, when men are indited, they have the liberty of a free Prison, though till then they were ordered to be kept in close Prison: And yet some thought that this might be doubted, since they were once formally banisht, and so the banishment should be formally taken off, and the raising of a dittay is no discharge of the banishment, for else the Kings Advocate might discharge banishments when he pleased, and indite-ments bear not to appear betwixt and such a day, but at such a day. 2. When men are under Caption, they may be taken, if they appear before the day of compearance, if they have not a Protection, which shews, that a meer citation doth not take off the dangers, to which the person cited is liable. 3. Protections were needless, if this were allowed, for the citation would be a protection, and yet Protections are ordained to be granted to Defenders in such cases.

As also it was doubted there, if such as are were cited upon sixty days, might compear with others of their complices, who were cited upon six dayes, for it was urg'd, that the appearing upon sixty dayes, was introduced in the Defenders favours, and so he might renounce it, and possibly he cannot compear at the long Dyet; and yet it may be urg'd, that the Pursuer has chosen his own Dyet, and it may be his true interest sometimes to divide the Defenders, and sometimes his Probation cannot be sooner ready.

When there are more pursuers, each Libelling a distinct interest, as three Brothers pursuing for the Murther of their Deceased Brothers, though they were all three killed at the same time, and in the same action. It has been found, that two of the pursuers being absent, the third could not insist: and so the diet was deserted, upon pretext that the Libel was complex, but I conceive, that the interests there were very distinct, though in the same Libel, and that though they had been all joint pursuers, yet the absence of the rest should not prejudice any one, who has a sufficient interest, *per se*.

VII. When the day of compearance comes, which is peremptor, and not with continuation of dayes, by the *Act* 6, the Justice-clerk calls the Summons, and if the pursuer be present, and the Defender be absent, he is declared Fugitive, and his Cautioner is unlawed, but if the pursuer be not present, then the Clerk calls upon the *Act*, for reporting of the Criminal Letters, and the Cautioner is unlawed, for not reporting the Criminal Letters: And in either cases an *Act* is extracted; and if both pursuer, and Defender be absent, the pursuers Cautioner is unlawed, for not reporting the Criminal Letters, and the Defender is outlawed, and his Cautioner is likewise unlawed for not presenting him; but if either, or both compear, the Cautioners take Instruments upon their reporting the Letters. If the Defenders Cautioner present him at the day, but if the Judge be absent or the day feriat, as if it be a publick Fast, then I think the Cautioner is not free; but he should present him at a day wherein he may be pursued, for his Obligation must be interpreted to be, *cum effectu*, especially if the Pannel would have been imprisoned, if he had not found that person Cautioner.

Upon their presenting the Pannel, then the Defender, enters upon pannel, and the Clerk marks, *curia affirmata die mensis* per and marks such a man entered upon the Pannel, such a day accused for the Crime, &c. and marks who were pursuers, and who were Proloquutors in Defence, and the Dittay is read, and the Justices ask whether the Pannel be guilty, or not; which is conform to *l. 3. ff. quam anis non possint, & l. & adulteram ff. ad leg.*



*Jul. de adult.* And the Advocats for the defender, dictat both the dilator, and peremptor defences, as the Advocats for the Pursuer, do his replies, & triplies, which has been originally introduced amongst us, as I conjecture that the Judges might not be seduced, by the passionat, and well acted Eloquence of Advocats, *Quintil Athenis* ( speaking of the *Areopage* ) *affectus movere etiam per praconem prohibetur orator*, *αἰσχρολογία τε ἱερὰ καὶ ἀσπίς*. By dictating also, the Advocat considers more gravely what he asserts in these cases, which are of so great concern, and the Judge has more permanently under his consideration what he is to do, and succeeding ages may better Judge of the grounds whereupon he proceeded.

## TITLE XXII.

### Of Exculpation, and the other Privileges competent to the Defender.

- 1 *The rise and progress of Exculpations with us.*
- 2 *Whether Exculpations may be admitted, though contrair to the Libel.*
- 3 *How alibi should exculpate.*
- 4 *Witnesses liable to Exceptions may be admitted in Exculpations.*
- 5 *Witnesses for exculpating may be admitted, though not cited.*
- 6 *Whether a man may be punished, though he has not fully proved his Exculpation.*
- 7 *How the Defender may exculpate if the Pursuer insist not.*
- 8 *Whether the Justices, or Assessors are Judges to Exculpations.*
- 9 *What if the Pursuer cite as parties, the Defenders necessary Witnesses.*

**A**lbeit after a Crime is proved, the Pannel is most unfavourable, yet till then, he is still presumed innocent, & *præstat notentem absolvere, quàm innocentem condemnare*, & *Petr. de Anach. Concil.* 23. observes well that the Court deserves much more honour, when they absolve, than when they condemn. The Reason of which is, because when an innocent person is condemned, the wrong cannot be repaired, but when a guilty person is absolved, yet God will either suffer him to fall into a second Snare, whereby the first Crime may be also punished, or at least, his infinite Justice will punish him eternally if he repent not.

When any person was criminally pursued, he had by the common Law the benefite of Exculpation, for so they term the Defences of the Pannel, as is clear by *Clar. quest.* 51. But I find not this term used with us, till the Year, 1661. at which time, it was used first in *Argyles* process. The *English* call this, to traverse an Inditement, from the *French* word *Traverser* ( as I suppose ) which signifies to oppose, or cross.

When a Pannel before that time, was pursued in *Scotland*, he behoved presently to propone his Defences, and have Witnesses there present, for proving it, or else he behoved to refer it to the pursuers Witnesses, for our Ancestors thought that the Pursuers Witnesses being present, could not but know all the matter of fact exactly, and so were as fit to prove the Exculpation, as the

the Libel; but this was a mistake; for Witnesses might have been present when the wound was given, who were not present at the beginning, when the occasion of the wound was given, whereupon the Exculpation of self defence was founded; so that other Witnesses are oftentimes necessary, beside these, adduced by the Pursuer, and it is not safe to presume, that these will come without a Citation, or if they come without a Citation, they are *ultronii*, and so are suspect.

In anno 1661, the Justices did begin to grant precepts of Exculpation, which were drawn by the Clerk, and exprest, that in respect there was a pursuit of such a Nature, intended against such a man, and that he had Defences to propone (here the Defences were exprest) therefore the Justices granted warrant to him, to cite Witnesses for proving thereof, &c.

This Precept was subscribed only by one of the Justices, yet thereafter in anno 1666. the Justices ordained, that a formal Summons, past under the Signet of the Session should be granted for citing Witnesses for Exculpation, and they are called now Letters of Exculpation, which contain the Defence, as formerly the precepts did, but because the Lords of Session use to scruple, to pass such Bills; therefore the Justices first consider the Defence, and if they find it probable, they use to subscribe the Warrant for a Bill, which Bill is past by one of the Justices amongst the common Bills, and that Bill is the warrant of the Letters.

When the Pannel is accused, and the Libel read, his Advocat doth propone the Defence, or Exculpation, *v.g.* if the Libel be Murder, the Defence is *in-culpata tutela*, &c. and after the Defence is debated, and either admitted, or repelled, by an exprest Signature of process, then the Witnesses are accordingly admitted.

If the Justices refuse to pass a Warrant for Letters of Exculpation, the Defender ought not to be thereby prejudged, but the Dyer will be continued, till Letters of Exculpation be raised, as was found in my Lord *Rentoun's* case, against the Laird of *Wedderburn*, Decemb. 1669. And though the Summons of Exculpation should be execute to the same dyet with the Principal Summons, yet if the Justices find it reasonable, they may continue the Dyer, and allow a competent time for raising Exculpation, as they did 13. July. 1676. In a case pursued by *Mackintosh* against *Grant*, for in remote Shires, the defender has not time to raise and execute Exculpations to the day of comparence in the principal Cause.

The ordinary Defences are to be seen in the respective Titles to which they relate, and it would swell this Title too much, and too unnecessarily to repeat them here.

II. It is ordinarily replied to defences of Exculpation, that they are contrary to the pursuers Libel, and so ought not to be admitted to probation, and thus Mr. *William Somervel* being pursued, for Murdering of *Bessy Rentoun*, it was alledged, that it was offered to be proved, that the wound was not mortal, as appeared clearly to many, who saw the same immediatly after it was given, Likeas she went that night to her Brothers house, three miles on foot, and never took bed, but wrought as a servant in her ordinary employments, for twelve weeks, And at last having gone to attend her Brother, who dyed of a spotted Fever, she was by him infected, and dyed of a Fever; which defence of Exculpation was repelled. Decemb. 1669. as contrary to the Libel, wherein it was expressly Libelled, that he gave her a mortal wound, that she died of the wound that he gave her, and I find it formerly repelled. 15. July, 1642. *Cheyn* against *Mowit*, But this principle, *viz.* that exculpation directly opposit to the Libel, should not be admitted, seems not to be

allowable, for all defences of Exculpation might be thereby precluded, for the pursuer might so circumstantiate his Libel, upon design, as that the only exculpation which he feared, behoved to be contrary to his Libel, and since in Scotland the pursuer is not precisely obliged to prove all the qualities which he Libels, but it is sufficient that he prove the Libel it self, the poor Defender might easily be cheated; for the pursuer might Libel all the circumstances exclusive of the exculpation, which he feared, and after he had thereby excluded the defence, he might contend, that albeit the qualities were not proved; yet the fact it self being proved it was sufficient. 2. In Civil cases, some defences are admitted, though contrary to the Libel, as in Ryots before the Council, and in Spoilzies: and therefore they ought much more to be admitted, in Criminal cases, wherein the Defender is more favourable, than he is in civil cases. 3. If this principle did generally hold, then self-defence, and casual homicide could never be allowed as Exculpations, for both these are directly contrary to the Libel, used in the case of *Homicide*; which bears still premeditation, and fore-thought-fellony. But to reconcile these differences, that which I find more suitable to reason, in these indigested discourses, vvhich the Doctors make upon this Subject, may be comprehended under these conclusions. 1. Where the defence is not absolutely contrair to the Libel, it ought only to be admitted to probation. 2. Though it be contrary to the Libel, yet according to the Doctors, a conjunct probation should be granted, for besides the former reasons, I find the *Civilians* debate very learnedly, whether when the pursuers probation of the Libel, is expressly contrair to the Probation led by the Defender, the Pursuers, or Defenders probation ought to be preferred; *Bossius tit. defens. reor*: which question were needless, if a mutual probation were not allowed, *eo casu*, and *Boss.* there advises the Defender, *capitulare directe contrarium ejus quod libellatur*, and when the probations differ, the ordinary rules to be followed are, that 1. The defenders probation is to be preferred *Gloss. in cap. in nostris de test.* because it is admitted by the presumption, that *nemo presumitur deliquisse*, *B. ff. ibid.* But if the probation be not equal, the greater number, or these who depose what is most probable, or the worthiest persons ought to be believed, *B. ff. ibid.*

How far this Doctrine is allowed by our practice, will appear, from a case decided in June 1670. In which, *William Mackie*, being pursued for killing *Hoom*, in a single Combat, did alledge, that if he did kill him, it was in his own defence; in swa far as *Hoom* fell upon him, with a drawn Sword. To which it was replied, that self defence could not be receiveable; because it was expressly Libelled, that there past a mutual provocation: and though he went to the Park without his Sword, yet having been thereafter provoked, and fighting, and killing the Defunct, he cannot be said to have done this, *se defendendo*, else the Act of Parliament against Duels, might be easily eluded; and though, if the Libels did only bear fore-thought-fellony in general, self defence might be receiveable to eleid the Libel; yet where the Libel was founded upon a special qualification of provocation, self defence was never sustained, to eleid the Libel, and the reason of the defence, is, because in the first case, self defence is not contrary, *substantia libelli*; but only eleids it in a quality, which is presumed and so needs not be proved, *viz.* fore-thought-fellony, whereas, in this case, if self-defence were receiveable, to eleid a Libel, founded upon provocation, and Duelling, it would be expressly contrary to the Libel, and to the quality of provocation, which is a quality that must be proved. In respect of which reply, the self-defence was repell'd.

III. But since defences expressly contrair to the Libel, cannot be sustain'd in our Law; it may be doubted, if the exception of *alibi*, be relevant: for since the Libel bears, that the Pannel was actor there, it is contrary to the Libel to alledge, that the Pannel was else where, than where the Crime was com-



mitted; for that is the same thing, as to alledge, and offer to prove that he killed not there. But I think in this case, *alibi* should be strongly qualified, and if it be, then both the Libel, and defence ought to be admitted to probation; but so that if the Judge find *alibi*, not to be clearly proved, then only he should allow the pursuer to prove his Libel, for to admit contrary Probations, were to open a Door to Perjury, and not to allow the Pursuer to prove also, were to infer a crime without Probation; for the Pannels not proving his Defence, doth not, in *criminalibus*, relieve the accuser from the necessity of proving his Libel, as it doth in Civil cases. And this seems to be our Law and more just and Christian, than conjunct Probations are.

IV. According to the opinion of the Doctors, Exculpation is so favourable that many who could not be received as Witnesses to prove the Libel, would be admitted to prove the defence, as a Brother; or a Domeſtick, *Jason in leg. ut vim ff. de just. & jur. et clar.*

And *Boerus, de duel. cap. 8. num. 82.* gives it for a rule, that *probanur articuli pro inculcata tutela testibus alias minus idoneis ut frater pro fratre affinis pro affine.* &c. *idem asserunt Mascard vol. 1. conclus. 490 Gail. de pas. publ. cap. 16.* For though it would seem that the presumption lies still against the killer, and so he should be burdened with the stronger probation, yet it may be answered, that that rule holds only against the accuser, but not against the Defender; as also, it may be answered, that he who killed in his own defence, was not doing what was unlawful, but what was lawful and necessary; and therefore the Law should presume in his favours, and not against him. And in *Rutherford's Process*, in *January 1664.* it was found, that Women might be admitted to prove self-defence, if there were Women upon the place.

V. It is very ordinary for some Judges, not to admit Witnesses to exculpate, except they be cited, and all the formalities be observed, in their citations, that are observed in other citations; But I should rather think with the *Civilians*, that as *testes in defensam*, are admitted, though they be not *habiles*, so Witnesses may be admitted, though not cited, for this was our ancient practice, and the benefit of Exculpation, is mainly brought in to favour the Defender: And is it not strange, that if a man were Pannelled for Murder, and saw two persons present, who knew that what he did, was done in his own defence, it should not be lawful to him, to desire them to be examined; this were to prefer meer formalities, to real truth: And whereas, it is observed, that these *testes*, are *ultranei*, who came without being cited, and so ought not to be received. To this it is answered, that all such as come without being cited, are not *testes ultranei*, but only such as offer themselves without being required, by Judge, or party, as if a man should step out, and desire to be examined: And whereas, it is urged, that they must be presumed partial, who come there merely to be examined, and this is the same thing, as if they offered themselves; it is answered, that the presumption is very groundless, for they might have come there without any such designs; and if they had such a design, they might safely have eluded the formality objected, by causing cite them. Others use a strange evasion in this case, for though they confess that Witnesses may be examined in Exculpations, though not cited; yet if a Summons be once raised, they conceive that none should be allowed to depone, but such as are cited; because, say they, the defender can only in that case blame himself, who used not the remedy, that was competent to him. 2. If the contrary were allowed, there needed no Summons of Exculpation be raised. 3. It is presumable, that the defender hath, *ex post facto*, corrupted that Witness; for if he had been able truly to depone any thing, he would have cited him at the beginning. Notwithstanding of all which, I humbly conceive, that even though no Summons of Exculpation have been raised,

raised, it is lawful to examine such as are not cited, for the same arguments urge for their examination, that were urg'd for examining such as were not cited, where there is no Summons raised. And as to the contrary Arguments it is answered, that to the first, there may be cases wherein the Defender is not to blame; as for instance, if he knew not the names of such as were present, when he was forced to kill; so that he could not cite them, but yet he knew their Faces, and so was forc'd to call them out, to be examined when he saw them in a Justice Court. As also, knowing that citations were introduced in his own favours, and to compel them to compare, he might have omitted the citation, or possibly knew not where they were to be found, or wanted Money to cite them; and this answers likewise the third argument. To the second, It is answered, that Summons of Exculpation, will be likewise very necessary in other cases, as if the Witnesses be unwilling to compare, or design to go abroad, &c. And whereas it is pretended, that if a citation had been given, the pursuer would have gotten the names of the Witnesses, who were to be used in the Exculpation, and so might have been ready to object against them. To this it was answered, that if this argument proves any thing, it would prove that no Witnesses could be received in Exculpations except they were cited, which were absurd; and the reason why Witnesses names were ordained to be given with the Libel, was introduced in favours of the Defender, and that he might not dy upon Depositions of suspect Witnesses; and so it were unjust to detort this to the Defenders prejudice: Nor is there such hazard of corruption in Exculpations, as in pursuities, for no man is to dy, no Estate to be forfeited, nor no mans Fame to be tainted, by the Depositions of Exculpating Witnesses.

But I find no such speciality in our Law, nor is that privilege reasonable, for men are prone, though they have not relation, to depone in favours, rather of the Pannel, than of the accuser; and therefore it is, that our Law allows an Affize of Error against such as absolve, but not against such as condemn.

VI. The Doctors also allow Exculpation to be proved, *per conjecturas, & indicia, l. merito. ff. pro socio Bos. tit. de favor defens.* but this is likewise reprobated by our Law, and if it were allowed, punishments should be absolutely arbitrary. But it is questioned what punishment should be inflicted upon the Defender; who hath proved his defence, but not fully: as if he prove by one Witness, that the murder was committed in defence, &c. For resolution of which doubt, they distinguish, whether the imperfect probation of the defence, be Diametrically contrary to the pursuers Probation, and in that case they think it ought not to be respected, both because it is in it self imperfect, and because it is contrary to a concluding probation: but if it be not fully contrary, but tending only to prove somewhat that is different from the Libel, as if the pursuer prove wholly the murder, and the Defender that it was done in self-defence, then they think that the probation, though not full, doth obfuscat, and weaken the pursuers probation; and consequently the Defender ought not to be punished with death, which punishment ought only to be inferred, *per probationem omni exceptione majorem, Bart. in l. Admonendi ff. de jur. Anchar. consil. 285.* And I think, that albeit the Affize be hov'd to file, *eo casu*, yet the Council ought upon a favourable representation from the Justices, to remit somewhat of the ordinary punishment.

VII. If the pursuer insist not, so that the defenders Probation of self-defence may perish in the interim, or if he who may accuse, will raise no accusation, then the person to whom the Exculpation would be competent, may intend a Summons, wherein he must cite the party injured, or his relations, and His Majesties Advocat, and in it he may conclude, that the Depositions

of the Witnesses, *ad defensam*, may be taken to ly, *in reventis ad futuram rei memoriam*.

VIII. When Witnesses are led, they should presently depone, and the Justices should be Judges to what they depone, and it ought not to be remitted to the Assize; because *non constat*, till the probation be led; whether the Exculpation be exclusive of the Libel, or eleids it; and so the Libel cannot go to the knowledge of an inquest, as was found after much debate in *Barcleys* case, but this (in my opinion) should only hold where the defence is exclusive of the Libel, but where both the Libel, and Defence are admitted jointly to Probation, I think that both should be referred to the Inquest because the Probation must be jointly considered, and the Justices cannot be Judges competent to the Probation of the Libel, and so not to that which is joyned inseparably with it.

If the Defender propone a defence, but prove it not, it is doubted, if by proponing the defence, he acknowledges the Libel? The reason of the doubt, upon the one hand is, that in all civil processes, he vvho propones a defence, acknowledges the Libel, and in reason it appears that this should hold in Criminals; for he who alledges that he murdered a man in self-defence, doth acknowledge that he killed him: but upon the other hand it seems hard, that if the Defender prove not his defence, that he should therefore dy: seing that were to condemn the Pannel, *per indicia* and without probation upon a meer formality, & *antequam constat de corpore delicti*, neither is the Pursuer prejudged by the Pannels not proving his defence; seing his Witnesses must still be present at the same time, whereas in civil cases that danger is not so great, and the pursuer is prejudged; for he is not obliged to have Witnesses ready for proving his Libel. To which last I incline, *vid. tit. Confession*: where I have debated, how far a qualified confession ought to operat.

IX. It is ordinary for the violent pursuers of Crimes, to cite as complices, all such as may be led as Witnesses by the Pannel, for proving his Exculpation, or other defences, upon design to decline, or set them from being Witnesses, when they are led; for one Pannel cannot be led by another, as a Witness for him. And yet upon the other hand, if this were allowed, as a sufficient exception, it should still be in the pursuers power to cut the Pannel off from proving even his justest Defences. To reconcile which, I remember that the Lords of Session in a spoulzie, pursued before them, the 24. of February 1662. at the instance of *Mackertney*, against *Irving* ordained these Witnesses, against whom the exception was propon'd, to be first insisted against; to the end if they were found innocent, they might be allowed as Witnesses against the other Pannel, if not, they might be declined. Which Method was very just before them, but seems more difficult in Criminal Courts, where diets are peremptor, and where Courts cannot be continued; But to this difficulty it may be answered, that though Courts cannot be continued by the Justices, *regulariter*, as in civil cases; yet in many cases, incidents may occur, whereby continuations are necessary, and all Laws must yeild to necessity.

The exception of self defence is treated. Title Murder. And it is fit to observe that in the *Areopage*, if the Pannel confest he committed Murder, but that he killed lawfully, he was not tryed, *ut dicitur*, where Murder was try'd, but *ut tradidit Perion. de magistr. athen. cap. 25.*



## TITLE XXIII.

## Of Affizes.

- 1 The origine of Affizes and Inquest.
- 2 The Form of citing Affizers; and who makes the Roll.
- 3 Sometimes there needs no Affize.
- 4 What is proper to be tryed by the Judge, and what by the Inquest.
- 5 The difference betwixt an ordinary, and a great Affize, and the number of Affizers in both.
- 6 The Oath of Affizers, and the Objections by which they may be declined.
- 7 Every man must be judged by his Peers, and who these are?
- 8 Whether Affizers may judge upon proper knowledge.
- 9 All Probations should be led in, presence of the Affizers.
- 10 The Affize after inclosure can speak to no man.
- 11 How the Affize ought to proceed after they are inclosed.
- 12 Wifful Error in Affizers, how punished: and by whom.

I. **A**LL Judgments were at first pronounced by Neighbours, and thus amongst the Romans; were *centumviralia iudicia*, and amongst the Feudalists, *parascuria*, were only Judges; in place of which last, came our Affizes in France, England and Scotland; they are called a condign Inquest; because these should be, *parascuria*, & *ita condigni*.

The Word *Affize* is originally French, and signifies properly sitting, or Session, *les assises sont les grands jours plaids solennels*, Roy Charles, Anno 1413. *vid. Indicem Regiam Verbi. affize* where it will appear, that Affize in French, signifies a Judicator; and in our Law it is often taken for a Constitution, or Statute which is made by that Session, or sitting of the Judges, and thus the Statutes of King David, are called *assisa Regis Davidis*: and *assisa terra*, is called the Law of the Land; *Assisa* is likewise sometimes called a Measure, and thus it is said, *Ja. 3. Par. 14. cap. 110.* that the Barrel should contain the Affize, and Measure of 14 Gallons, and the *assisa balcum*, or Affize of Herring, signifies a certain Quantity, and Measure of Herring, which pertains to the King, as a part of his Customs, *Ja. 6. Reg. 15. cap. 237.* And in the French Law, it signifies a Tax also, *Regiam iud.* But the proper Acceptation of the Word Affize, as it is now determined by Custom, is to signifie these who are chosen by our Law to determine, either in Civil, or Criminal Cases, the matter of Probation, and are in effect neither properly Judges, nor Witnesses, but both.

II. For the more exact clearing of the Office of Affizers in criminal Cases, the Reader may take notice, that the Libel always bears, that the Pursuer shall Summon an Affize, not exceeding forty five persons, which shall be given up in a Roll to the Messenger, and should be subscribed by the Pursuer, which Roll shall be annexed to the end of his Execution. *Ja. 6. Pa. 6. cap. 16.* But albeit this Act appoints, that the Roll shall be subscribed by the Pursuer; yet it is sustained as valid, though not subscribed by him, if he homologat, and ratific

tifie the Execution given in by the Messenger, albeit it may be alledged, that the summonding of Affizes, is *ea casu*, not lawful, seing it wants a Warrant : This subscribed List being by the foresaid Act of Parliament, and summons it self, appointed to be the Warrant : As also albeit by the Act, the Messenger is prohibit to cite any more than forty five, under the pain of five hundred Merks, yet the Execution is not *eo casu*, declared thereby to be unlawful, and by that Act it is likewise declared that upon Supplication, the Lords may allow more persons to be cited than forty five.

Why the Pursuer should have had the choice of the Inquest, may be doubted. And if Affizers may judge, *ex propria scientia* ; it would appear, that to allow the Pursuer the choice of the Affize, were to put the Defender absolutely in his will : And I find that *Gail l. 2. obs. 34.* concludes, that the custom of some places allowing, *domino electionem parium* (Pares apud nos, signifies Affizers) is most unreasonable, *quia dominus ita, est quodam modo iudex in propria causa, nam est procul dubio eos electurus, per quos se victoria partitum sperat.* *Alvarot, ad cap. 1. de contrav. fend.* To which difficulty it may be answered, in defence of our Law, and Practique, that 1. Where the Advocat is Pursuer, it is presumeable, that he will be most just, and that he will proceed without Interest, or Malice. 2. These Affizers are in effect, either Judges or Witnesses, and the Pursuer hath still the choice, of both Judges, and Witnesses, if they be otherwise competent. 3. As the Defender may decline them, if there be any reason for it, so they are sworn; nor is it presumeable, that any will be so impious, to condemn a man to die, to please others : Upon which Presumption, our Law leans so much, that though Affizers condemn unjustly, they are not lyable to an Affize of Error, as is believed. But by the third Article of the Regulation, 1670. the List of the Affizers, is to be made by a *Quorum* of the Justices, and that List should express not only the Names, but the Designation of the Affizers.

When the day of comparance is come, and the Letters are called, and the Affizers are likewise called, and each absent Affizer is for his absence fin'd in an hundred Merks, and their Unlaws are to be taken up without any composition, *Ja. 6. Parl. 12. cap. 126.* By which Act it is likewise appointed, that an Act is to be extracted upon their said absence, and is to be delivered to the Swearer, or his Clerk, within six days thereafter, that Letters may be direct thereupon, for taking their unlaws, but the pain of ilk absent Affizer at a Justice Air, is to be forty Pounds, *Ja. 6. Parl. 11. cap. 81.* If the Affizers summoned be not present, others may be summoned at the Bar, or *apud acta*, as we call it. *Ja. 4. Parl. 6. cap. 94.* When the Affizers are called, fifteen of them are marked, and then the Dittay is read; for the Debate upon the relevancy must be in presence of the Affize, *Ja. 6. Parl. 1. cap. 90.* seing albeit they be not Judges to the relevancy: yet since they are Judges to the Probation, which depends much upon the relevancy; and seing the Justices remit several Defences, which are proponed against the Relevancy, to the Inquest, it is most reasonable they should hear the Debate.

III. The Defence against the relevancy begins thus; it is alledged by *A.C.* as procurator for the Pannel, that the Pannel should not go to the knowledge of an Inquest; because, &c. And after all the Defences are discust, the words of the Interloquitur bear, that the Justices either sustain, or repel the defence, & find, or not find, that the Pannel should go or not go to the knowledge of an Inquest, and if the Justices find the Pannel should go to the knowledge of an Inquest, either the Pannel confesses, & *quia in confessum nulla sunt partes iudicis*, therefore he may be banished, or scourged, without being put to the knowledge of an Affize, as in *Rutherford's case*, the 9 of July 1622. and in *Jobs case*, who was scourged, and banished for Bigamy, without an Affize, 19. Jan. 1650.

But

But if the Crime be capital, or the pannel do not willingly acquiesce to the punishment, it is still securer to put the Pannel to the knowledge of an Inquest; because the Justices are only competent Judges to the relevancy, and the Inquest only can find the Libel proved.

IV. Albeit it be a received Principle in our Law, that the Justices are only Judges to the relevancy, and Affizers to the Probation; yet to distinguish the Limits of their different Cognitions, becomes very oft difficult upon these two accounts, 1. By express Act of Parliament, *Ja. 6. P. 12. cap. 151.* It is Statute, that because Parties were oft times frustrat of Justice, by alledging irrelevancy against criminal Libels; therefore when the persons complained upon, are libelled to be Art and Part, no Exception, or Objection shall take away that part of the Libel in time coming; so that albeit the greatest Debate concerning relevancy, amongst Lawyers in criminal Cases, did arise upon these common places, *ejus ope, auxilio, assistentia, mandato, &c. ea crimina erant commissa*, and from what Circumstances these could be inferred, yet now the Debate upon all this, falls not by that Act, under the Cognition of the Affize, all these being Branches and Qualifications of Art and Part. 2. The Probation requires oft-times in it, somewhat of Relevancy, to be previously debated, as for instance, whether an extrajudicial Confession is binding, or what Witnesses in Law are receivable, or not; all which cases, do oft-times confound the Cognition of the Justices, and Affizers; but for clearing of these Limits, thir following Conclusions are to be observed. 1. That in *dubio*, all that concerns Law is to be judged by the Justices, & what concerns fact by the Affize. 2. *Regulariter*, all that is in the libel falls under the cognition of the justices, & therefore I will recomend it as a caution to Advocats, and when they are jealous of the ignorance of Affizers, and find the case intricat, that they do not simply libel, that such persons were art and part; but that they libel them to be art and part, in so far as they rescued the Malefactors, &c. For when the qualifications, from which art and part are infer'd, are expressly libelled; the Justices are Judges to the relevancy of the inference, but if these condescend not that they are art and part, in so far as &c. then the Affizers are only Judges competent thereto, though the same be, *in apicibus juris*, because of the former Act, as was found in Captain *Barclays* case, November 1668. where they refused to force the pursuer to condescend, *quo modo*, art and part; albeit this be very dangerous, seeing Affizers are oft-times ignorant persons, and yet they forced the Pannel to condescend upon the particular qualifications of self-defence, and would not refer to the Affize to consider the qualities of self-defence, which would arise from the probation, as to which I could never find any reason of disparity, but that by the Act of Parliament, the one case is appointed to be decided by Affizers, whereas there is no Statute as to the other; but to speak ingeniously, I find no Act of Parliament more unresonable than this; for the Statutory part of that Act, committing the tryal of art and part to Affizers, seems must unjust, seeing as has been said before, in committing the greatest questions of the Law, to the most ignorant of the Subjects, is to put a sharp Sword in the hands of blind men, and the reason inductive of this Act specified in the narrative, is likewise most inept and no wayes illative of what is thereby Statuted; since debates upon the relevancy could very little have hindred, and never have hindred Justice, for the relevancy is debated now, as copiously as before that act, with this only difference, that it was then debated before Judges, who could have kept Advocats at the point, whereas it is now debated before Affizers, who know not how to bound, or how to stop them. But a better reason for this Law had been this, *viz.* That the pursuer is not allowed to examine the Witnesses, and



so is not presumed to know what they can say, and therefore he cannot exactly know all the circumstances, which are necessary for founding a clear condescendency in Art and Part, untill he hear the Witnesses depone. And being the Affizers are only Judges to the Deposition of the Witnesses, therefore they ought likewise to be Judges to the qualification of Art and Part, but I think that after the Witnesses have deposed, the Justices should still determine, what is Art and Part, and should not leave the same to the Affizers, and as they are founded *quoad* this, upon the former principle, that they are only Judges to the matter of relevancy; so they are not excluded therefrom by the foresaid act of Parliament, for it only ordains, that Art and Part being libelled, no objection shall take away that part thereof; And thus if a man be pursued as art and part of Murder, the Libel should doubtless go to the knowledge of an Inquest. But when the probation is led, the Judge, when he hears the Probation to run upon rescue, mandat, or rathabition, should tell the inquest what Acts in Law do infer either of these, and then to leave it to them to Judge, if these Acts which he declares to be relevant, be proved; And it is much fitter, than to leave poor ignorant Affizers, to the impression of Advocats, who may by-esse them by their repute, Authority, or confidence. 3. Albeit the Affize be Judges of the probation, yet what manner of probation is requisite, belongs to the cognition of the Justices, and thus the Justices determined in *Balcarnquels* case in Anno 1665. That Witnesses could not be proved to have perjured themselves, by the Depositions of other Witnesses, but only by writ, or Re-examination. And in the Action of Usury, pursued against *Witherspoon* March 1666. They found, that Usurary pactions, being extrinseck to the writ, could be proved by other witnesses, than the Witnesses insert: And in the case of *Wilson*, November 1667. they found, that the receiving more than the ordinary Rent, was not probable by the Oath of the payer, and yet if any of the Affizers please, he may desire *ad informandum conscientiam judicis* any probation whatsoever to be taken, and thus often times in the Criminal Registers, Affizers have caused read Testificats from Chirurgians, and others, *licet regulariter testibus, non testimoniis est credendum*. The last rule is that before the Affize be sworn, all the cognition belongs to the Justice, but after they are sworn, the Justices *functi sunt officio*, and all thereafter falls under the cognition of the Affizers, as is clear by the very words of the Justice Interlocutor, which runs thus, the Justices finds the Libel relevant, notwithstanding of the defences, and ordains the Pannel to passe thereupon to the knowledge of an Inquest.

But to prevent all thir difficulties, I wish that the justices were Judges both to relevancy, and probation, which overture seems most fit, and advantageous for these subsequent reasons.

1. That there is such a contingency, betwixt Relevancy, and Probation, that they should not be disjoyned, and sure they must best understand what probation is requisite, who have considered the Relevancy, upon which it depends, and for this cause it is, that even our Law appoints all the dispute upon the relevancy, to be in presence of the Affize.

2. The Affize is oft stumpled at what is referred to them, and do very often mistake what is found relevant, and what not.

3. Affizers with us, are oftentimes ignorant persons, at least seldom or never are they so judicious, as to understand such intricat matters, as Advocats represent to them, especially in Circuite Courts, where few have seen Affizers before, and they are oftentimes but mean persons, or persons who have interest.

4. By our Law the Libel is relevant, if Art and Part, be libelled without condescending that they are Art and Part, in swa far as, &c. and the Affizers

ers are only Judges to what is Art and Part, so that in effect they are Judges to the relevancy of almost all cases, and are put to decide what has troubled the ablest Doctors and Authors, and so often times they return informal verdicts.

5. Affizers are troubled in their commerce, and abstracted from their Affairs unnecessarily, being obliged frequently upon continuation of dyets, to wait whole years and are oftentimes absent, whereby dyets are deserted, and they oftentimes sined.

6. By this means, Affizes of Error would be suppressed, with which Affizers are still threatened by the pursuer, before they be inclosed; and it seems Barbarous, that persons who absolve should be punished, whereas there is no punishment for condemning, which inconveniency would also be taken off by this overture.

7. Affizers may in our Law judge according to their privat knowledge; without Lawful probation, which seems dangerous in Criminal cases.

8. Though of old when Judges, and Affizers were equally ignorant, Affizers were appointed, yet now when Law is formed to a Science, and that judges are presumed to be learned, and Affizers not, it seems reasonable they should be suppressed, as well in Criminal cases; as they are already in Civil, and since we have receded from the present custom of England, and our own old customs, by not allowing Affizes in civil cases, why not rather in Criminal cases, these being both of more intricacy and weight; especially seeing in England the probation is before neighbours in the Countrey, who know best the matter of Fact, but with us Affizers are seldom or never choosed from the place where the Crime was committed, but are Burgesses of Edinburgh who are as great strangers to what pass, as the Judges themselves; and if Affizers were to be brought from the Countrey, it would be very expensive.

9. The most learned and polisht kingdoms, and Common wealths, who have formed their Laws in calm and learned ages, make their Judges discuss both relevancy, and Probation; and it is thought that either Affizers have been introduced by us, when we and England were both barbarous, or else the Justices have invented this Act at first, to relieve themselves of a burden.

V. The Affize is either an ordinary, or great Affize, the great Affize is that, whereby an ordinar is tryed, if they do wrong, and I find some foundations for thir terms, *par la custum d. langumois, Act. 4. & da Rochal art. 1. la grand affise est du seneschal la petit du juge prevoistal*. An ordinary Affize uses to consist of fifteen persons, but they may consist of more, or fewer if the number be unequal, and thus the penult of June, 1614. Ronald was tryed, and convicted, for dismembring Donaldson, by an Affize of thirteen persons. The reason why the Affize must be unequal in number, is, least by equality of Votes affairs be not terminat, and brought to a speedy issue: for which cause likewise, *lib. 2. Reg. Maj. cap. 5.* and by the 87, Act 6. Parl. K. Ja. 1. it is appointed that Arbiters should be appointed in an unequal number, & yet I find, that in the civil brief of right, an Affize should consist of twelve sworn men.

Albeit according to the Law of England, the Affizers must all agree in one voice; yet with us the major part may condemn or absolve; but if six, of fifteen be only positive, and eight, *non liquets*; it may be doubted, if this verdict should condemn; for else if one did condemn, and fourteen were not clear, that one would condemn, which were most absurd; and in July 1675. a verdict in a perambulation, betwixt, Walsfoun, and Sr. John Cheesly, being quarrelled in an Advocation, as unjust; because the greater number, were *non liquets*, the Lords did Advocat the cause to themselves, which implied that they did not sustain the verdict as valid.

VI. The Affizers are ordinary called by fives, and the Oath administrat to them, is *That you shall all the truth tell, and nae truth conceal, in so far as you are to passe upon this present Affize; swa help you God.* Which I find likewise to have been the form of old, *Reg. Maj. lib. 1. vers. 12.* And albeit by the 138. *Act. 13. Par. Ja. 1.* it is ordained, that all Judges shall cause Affizers swear, when they take their Oath, that they have not taken any Buds from the party; yet they do never tender to them this Oath; except either the Judge, or Party be jealous of the Affizers.

Affizers are partly Judges, partly Witnesses, as has been said before, they are Judges in so far as they consider the probation led by others, and judge whether proved, or not proved: They are Witnesses in so far as they may condemn, upon proper knowledge, without any other Probation; And therefore whatever exceptions may be proponed, either against Judge, or Witness, are admitted against Affizers; and thus an Affizer was set (for that is the term of declining used in this case) because he was not twenty five Years of age, which is the age required in a Judge, *Act 132. Par. 12. Ja. 6 vid. 7. June 1616.*

But because the Exceptions against Affizers, are ordinarily coincident with these, that are against Witnesses; therefore we shall remit them to the Title of Witnesses. Only it is fit to take notice that the Chirurgians of *Edinburgh* are excemed, by *Q. Mary*, from being cited upon Affises; because of the peremptoriness of the employment, which was sustained by the Justices, *July 1671.* both as to Affises within the Town, and without the Town, though our learned *Craig* being a Justice Deput, had formerly sustained it as to Affises, without the Town only.

VII. It was a principle in the feudal Law, that all men should be judged *per pares curia*, the meaning whereof was, that a Vassal should be judged *per convassallo*; because it was presumed that these understood best the person to be tryed, and the knowledge of the Pannels former life and conversation is a great help towards a sound Judgement of the case; and from this feudal custom rises our maxime, that every man should be judged by his Peers *quon. attach. cap 67.* The words are, It is Statute, that no man shall be judged by a lower person than his Peer, an Earl by an Earle, a Barron by a Barron, a Subvassal by a Subvassal, and a Burges by a Burges, but a lower person may be judged by a higher, and by the *chap. 2. Stat Alex. 2.* A Knight should be judged by Knights, or freeholders but by an Act of Sederunt 1. *June 1591.* The Lords of Session declared all such as were landed men, sufficient to passe upon Affises of Error, though the old Laws required Noble men, & Gentlemen only in such cases: And albeit of old it was uncontravertedly received, that none should passe upon the Affize of Noble men except Noblemen, Nor upon the Affize of Barrons, except Barons, yet of late it hath been much debated, and especially in the case of *Don lasse* of Spot, 9. *May 1667.* at which time he being accused for killing *Home* of *Escles* it was alledged, that *Spot* was a Baron, and so could not be judged but by Barons, holding of the King conform to the citations above deduced.

It was replied by his Majesties Advocat. 1. Neither the Books of *quon. attach.* or the Statutes of King *Alexander*, are binding Laws, but only Books of Apocrypha. 2. Though they were Laws, yet they were not *in viridi observantia*, seing Burgeses and others are daily admitted by the late practise, to pass upon Barrons Affises, and at the time of the making of these Laws, Affizers were Judges both to the Relevancy, and Probation, whereas now in effect, they are but witnesses; and therefore since the Law reposes much less Confidence in them now, than formerly, it should not now be so scrupulous in their Election. 3. Burgeses are in Parliament allowed to sit upon the



the Affize of, and forefault Noblemen, and it were against Reason that they should be admitted to the more solemn Judicators, and be rejected in Judicators where cases of less importance, are ordinarily judged, and in which the Sentence pronounced may be easier repealed. 4. Dyets before the Justice-Courts being alwayes peremptor, it is probable that Dyets behoved very frequently to be deserted, if only Noblemen were to be judged by Noblemen, Barrons by Barrons. 5. By the Statute of King *Alexander*, above cited, it is only requisit that Knights be judged by Knights, but it is not added there, that Barrons should be judged by Barrons, which shews that that Priviledge, was not allowed to them, even in those days, and lastly, seing all mens Lives are of extraordinary concernment, it is not reasonable to think that he who can be Judge of any mans Life, may not be Judge of the Lives of all Men.

To which it was duplyed as to the first. That Debate is opposed, whereby it is evinced in the Title, by what Laws Crimes are judged in *Scotland*, and the Books of *quon. attach.* and *Reg. Majest.* are our Law, and the Act of *Sederunt* above-cited, dispensing with that priviledge in some cases, doth demonstrat, that regularly this Priviledge taketh place with us: Likeas *Skeen* in his Treatise concerning the procedure before the Justice-General. *cap. 4. sect. 3.* cites these Laws as binding, and gives for a rule that no man can be judged in that Court but by his peers.

To the second it was duplyed, that this being a declinatur, and being arbitrary for Parties, to plead the benefit thereof, it cannot be said to be antiquated, unless it had been alledged that it had been pleaded, and repelled: But as this Citation out of *Skeen*, who is but a late Author, did shew the same to be *in viridi observantia*, so Noblemen have lately had the same indulged to them, as in the cases of the Earl of *Traquair*, and Lord *Ochiltree* which which was allowed to them upon the Laws here cited. To the third founded upon *Burgesses* sitting upon forefaulters in Parliament; the same doth not meet the case, seing the Parliament may abrogat Laws and so are not in their procedure tyed to them: and though *Burgesses* singlie, be not Peers to Noblemen, yet the collective body of the Parliament, by which they are condemned are much more their Peers.

To the fourth, it was duplyed, that inconveniences are only to be looked to in the making of Laws, but not after, and the inconveniences of the other side are much more pressing, it being very inconvenient, that an Affize of 15. mean Tradsmen, should be admitted to try a Duke, or Marquess; and it was a vast mistake to think that Affizes are only witnesses, and not Judges; seing they vote, and their verdict is called a Sentence, and if Art and Part be Libelled, the relevancy is in these cases, (which ules to be of all cases most intricat) simply referred to them without any debate. To the fifth it was duplyed, that the inference is meerly conjectural, but if the Text be considered, it will appear that by Knight, there is meant Vassal, or free holder, for the *Latine* translation renders the word Knight, not *equus* but *miles*, and it is said there, that a knight shal be judged by Knights, or free holders; So that the particle (or) is in that place exegetick, and not disjunctive. And to the Last it is duplyed, that all mens lives are not equally precious in the eyes of the Law, for even by the *Roman* Law, mean people were judged to dye for many crimes, which were not capitall to Noble *Romans*, and though with us the punishment may be the same, yet the way of procedure against Noblemen is justly allowed to be more solemn. Upon which debate, the Justices ordained a new Affize to be summoned, whereof the most part should be Barrons, and the remanent landed Gentleman.

It was thereafter doubted, whether an apparent Heir of a Barron, has the the same priviledge, so that none can passe upon his Affize, who are not Bar-

Barons or Landed-men; and it was alledged, that the apparent Heir, had this Priviledge, and was a Barron in the construction of Law, for his Marriage, or Escheat would fall, though not entered, and as a Barron though denuded, remained still a Barron; or a Prelat, though for age demitting, would be still a Prelat; so the apparent Heir of a Barron, though not entered, should be still a Barron, as was found, 23 December 1674. To which it was answered, that an apparent Heir, was not *nomen juris*, and Priviledges ought to be strictly interpreted, and the appearing Heir of a Barron, would not have an Heir, as was lately found in Sir Alexander Seaton's case, *quem sequitur incommodum, &c.* Whereas in Law, all Barrons may have Heirs, nor did the Instances adduced from the Casualties of Marriage, or Escheat militate in this; seeing these proceeded, *ex natura feudi, non ex vi privilegii*, & was introduced in favours of the Superior, and not of the apparent Heir. Upon which Debate the Justices, 19. of July, 1675. repelled the Objection against the Assizers, and found the Priviledge extended not to the apparent Heirs of Barrons; *Mackintosh contra Frazer of Culbokie*. Nor is this priviledge extended to Landed-men, though infest, if their Lands be not erected in a Barrony.

VIII. Albeit it be ordinarily received, that Assizers may judge upon their proper knowledge, yet the truth of that Principle may be doubted, upon these reasons, 1. Because by the foresaid Act of Parliament, *Par. 11. K. Ja. 6.* All Probation should be led in presence of an Assize, and Pannel; but so it is, that the privat knowledge of Assizers, cannot be said to be led before them. 2. If Probation were led publickly, Defenders might propone Interrogators, whereby the matter of Fact might be more fully cleared, and even the Witnesses own mistakes might be removed; of all which just Advantages, he is precluded by that Principle. 3. The great Reason why by the Act, Probation should be led in presence of the Pannel, is, because in Law its presumed, a Witness will stand more in awe to depone falsely, in presence of the Pannel, than otherwise; for which cause, confronting of Parties, and Witnesses among themselves, when they are contrary, is much used, and treated off by the Doctors. 4. If Assizers may give their Verdict upon privat knowledge, then they could never be pursued for Error; because if privat knowledge be the Rule, I can hardly understand, how men can be convicted, as having transgressed against that Rule, seeing albeit it be easier to judge what a Man should know, yet it is impossible to judge what a man doth know. 5. By the Civil Law, and the Opinion of almost all Divines, and Nations, *judices debent judicare secundum allegata & probata*.

IX. From the foresaid Act. *Parl. 11.* ordaining all Probation to be received, and used in the presence of the Assizers, and Pannel, it may be deduced by a necessary Consequence, that no Witnesses should be examined in Criminals, *ad futuram rei memoriam*, and that no Witnesses should be examined by Commission: & albeit, it may be objected, that *in crimine falsi*, the Probation led before the Lords, is not repeated before the Justice, and Assizers, before whom nothing is used to instruct the Falshood, but the Decreet of Improbation pronounced by the Lords, for in that case, the Lords being by Act of Parliament, declared Judges competent to the Cognition of falshood, their Sentence, *habetur pro veritate*, and is *probatio probata*; so that the producing of it, is the leading of Probation before the Assize. This priviledge, that no Probation should be led, but in presence of the Pannel, and Assize, may be past from by the Pannel, seeing it is introduced in his favours: and therefore it was found, the 9. of March 1671. that the Dyet could not be continued against *Charles Robertson*, because of the absence of the Witnesses, seeing he was content to stand to the Dispositions formerly taken; but they caused him subscribe his consent.

After the Probation is closed, the pannels Advocats make a Speech to the Assize

Assize, wherein the terms they use to them is, *good men of Inquest*, and after they have ended, His Majesties Advocats speak, but there are no Duplys, or Triplys used; and it was the priviledge of his Majesties Advocats to be the last Speaker; which priviledge was assumed likewise by all other Advocats for the Pursuer; but by the tenth Article of the Regulations, 1670. The Defenders Advocats is now the last speaker, except in the case of Treason, and Rebellion; so that this priviledge holds only in Perduellion, but not in ordinary Treason.

X. When both these Discourses are ended, then the Assize are inclosed; but before they be inclosed, they should endeavour to be satisfied of any Doubt; for if after inclosing any person speak to them, or if any of them come out of the place where they are inclosed, until the Verdict be pronounced, the Pannel is *eo ipso*, clean and innocent, *Act 91. Par. 11. Ja. 6.* the Reason inductive of which Act, seems to be, fear of Impressing, or suborning the Assize, and therefore, the practice allows Assizers sometimes to send out some of their Number to the Justices, to receive Informations, in matters of Fact, and finds that in so doing they transgress not this Act, as in *Kennedies* case, *August 1662.*

And after a full Debate, upon the 24 of December 1672. It was found, that any of the Assizers disclosing, and coming out of the House, after they had past a Vote, though the Verdict was not subscribed by the Chancellour, was not sufficient to annul the Verdict, albeit it was here alledged, that there might be great debate upon the wording of the Verdict, and so the Assize should not have disclosed, until the Verdict was subscribed. By this Act likewise the Assizers, and not the Justices are Judges competent to this Exception against the Verdict, as was found in the foresaid Decision, 1672. wherein the Justices found, that themselves were Judges competent to the relevancy of any such Alledgance; but that it belonged to the Assize to judge the probation of that Exception, though it was alledged, that the Assizers could not at all be Judges thereto, seeing they were the Delinquents in that case, and if most part of the Assize had disclosed, it were absurd, that they should be Judges to their own Delinquency. At that time the Lords did likewise declare, that if any Assizer should disclose before the Votes were compleat, so that the Verdict might be thereupon annulled, they were punishable by the Justices, and should be obliged to repair the loss, which either the King, or Party incurred.

So that Assizers are allowed to speak to Judges, or Advocats, but are not allowed to make any address to them after inclosure, as said is. It is likewise observable from this Act, that albeit the Clerk be discharged to enter in where the Assize sits, after they have chosen their Chancellour, yet *de facto*, the Clerk sits still with them, and it was thought fit he should do so; because they being oft ignorant and unacquainted with the forms and procedure of that Court, they should have some person to regulat them, and none so fit to do it, as the Clerk; yet by the late Regulation, 1670. it is appointed, that the Clerk shall not be present, and sure the Clerk was worth ten, and did influence too much.

XI. After the Assize are inclosed, they choose a President, vvho is called Chancellour of the Assize, and proceed to read, and thereafter to reason upon what is debated, and their determination is called the verdict of the Assize, which is subscribed by the Chancellour, it is called verdict, *quasi vere dictum*, and sometimes it is called, *warda curia quon. Attach. cap. ubi aliqua.* thereafter the Assizers enter again into the Court, and there the verdict is read, and the Chancellour stands up and owns the same, after the verdict is read, it should, and is by the 9. *Act of Regulation*, 1670. closed, and sealed with the Seals of the



Court, of the Chancellour of the Affize, and of so many of their number as the Chancellour shall think fit, never to be opened, but by orders from the Judge; of which verdict, the Clerk is to have the keeping, and if he open the same, he is to be deposed, and further punished as the Judges shall think fit.

It was thought of old, that Affizers behoved presently to determine, after Probation was led, & that it was not lawful to dissmisse them until they did enter and return their verdict, and the reason of that opinion is, because after the Probation is led, there may be hazard of suborning the Affizers, if the matter were continued to a new day, and it were to be feared likewise, that the pursuer finding that the Witnesses which he had led, did not prove, he might be tempted to suborn others, and I think this opinion strongly founded; but yet in *Anno 1665*. &c, a Baxter being pursued for Sedition, the Justices did, at my Lord Advocats earnest solicitation, dissolve the Court after probation was led, and continued the matter to a new dyet, but the accusation was never further prosecute, and that procedure was thought, *mali exempli*; yet thereafter His Majesties Advocat continued an Affize, who sat upon *Macknab* for theft, for not being clear to condemn upon an extrajudicial confession, they proposed the case after they were inclosed, whereupon the Justices continued the dyet till the next day, and having consulted the Council, they thereafter found the confession sufficient, and inclosed the Affize, notwithstanding of this objection, *November 1669*.

XII. When the Advocat closes his discourse for the pursuer, he protests for an Affize of error against the Inquest, if they assoilzie, which Protestation he causes to be marked by the Clerk, and it may be doubted, if the pursuer, or His Majesties Advocat can pursue the inquest for error, if this Protestation be not used. even as a qualified Oath is not allowed, except it be protested for. And it was debated in the case betwixt the Lady, and Laird of *Milnour*, if a reprobator could be raised, where the party laesd protested not for it. seing Protestations were such solemn Acts as the Law required in such cases, and they were unnecessary, and superfluous, if what were protested for, could be allowed, without being protested for, and the party to whom such protestations were competent, doth, *eo ipso*, passe from his right, and seems to acquiesce in what is to be done, if he use them not, *vid. Durand. specul. tit. reprobat. in initio*. but this case was not decided; yet the Lords inclined to allow a reprobature if there was reason for it, though no Protestation was used; and I believe that Action of error may be raised, though it be not protested for, if the verdict be quarrellable, though a Protestation be both most secure, and formal, and really there is good reason why it should be used, seing the Inquest is by that solem denunciation, and intimation warned of their hazard, and their error, because it becomes thereby more wilful than otherwise it would be.

A Summonds of error is alwayes raised in Latine, and upon Parchment, and is direct out of the Chancery.

*Wilful error* is that Crime which Affizers commit, in pronouncing an unjust verdict, and by our Law, an Affize condemning, cannot be pursued, *tanquam temere jurantes, supra asisa*, as is commonly believed, by the 63. *Act 8. Par. 3*. the reasons of which opinion may be three. 1. Is it not presumable, that indifferent persons would condemn an innocent out of feid or favour, though there be some reasons to be jealous, that they might be induced, out of either pity, or clemency to assoilzie them from a Crime fully proved. 2. No person would be found to go upon an Affize, if they might be punished for condemning. 3. The penalty of such as *temere jurarunt super asisam*, is only confiscation of the moveable goods, *cap. 14. lib. Regiam. Maje.* whereas death would be oftentimes

times the punishment, if such as condemned might be punished; yet I am of the opinion, that if the Assizers did condemn an innocent, without any probation, or by palpable iniquity, that *eo casu*, they might be punished: And my reasons for this opinion, are 1. That else the people would be stated in a very infortunate condition, if not only they lay open to the hazard of being condemned, upon the Deposition of any two men, but likewise to the arbitrariness of an Assize, who might condemn without any clear probation. 2. Assizers are Judges, and Witnesses, and therefore must be liable to all the errors, for which they are accountable; but so it is, that if a Judge condemn unjustly, or if a person be condemned upon the Deposition of any Witness, who deposes falsely, that Judge, or Witness so deposing, are liable to a capital punishment, why then should an Assizer be exempted, seeing there is no expresse Law upon which he can found that exemption? And in answer to the contrary arguments, it may be contended: That as to the first, it is not concluding, seeing, else it might by the same argument be concluded, that no Judge, or Witness could be pursued, when they condemned unjustly, seeing *omnis homo presumitur bonus*, at least Perjury should never be punished in a Witness, nor injustice in a Judge, deciding unjustly, and by that unjust decision, murdering the person Pannelled before them; because forsooth it is not presumable, that a Witness, or Judge would murder an innocent by their sentence, or Deposition. To the second, it is answered, that all men may be forced to pass upon Assizes, upon the peril, and thus Assizers are forced, though there is hazard also in alsoilzing, and Witnesses are forced, though there be great hazard in Perjury, if they depone falsely. To the third, it is answered, that there needs no Law to punish Assizers, condemning unjustly, seeing they are punishable by the Common Law. But that it was necessary there should be a particular Statute, to punish such as alsoilzed unjustly, both because the common Law was not so expresse as to this, and because men might be induced to think, that there was no great hazard in it.

This error in Assizers, is to be tried by a great Assize, of twenty five Noble Persons, *Act 63. Parl. 8. Ja. 3.* but the person alsoilzed is to be free *ibid*, And by an Act of *Sederunt*, of the Session, *Anno 1591.* it is declared, that all landed Gentlemen shall be in a capacity to pass upon an Assize of error, though they be of Quality, and Estate inferiour to the Pannel, and wilful error is only punishable in this case. *qualibet probabilis causa ignorantie excusat*, *Spot. tit. Retours, Ker against Hartwood mires*, and by the 47. *Act. P. 6. Ja. 3.* it appears, that no probation can be adduced, to infer this action of error but what was at first produced the time of their verdict; whereas any Probation may be adduced in fortification of the verdict quarrelled; (*tantum est favor innocentie*;) the punishment of such as are found guilty by an Assize of error, is the Escheating of the Moveables, and a Years imprisonment, *cap. 14. l. 1. Reg. Maj.* which is ratified by the 47. *Act 6. Parl. Ja. 3.* where it is Statuted, that wilful, or ignorant Assizers, shall be punished after the form of the Kings Law, in the first Book of the *Majestie*, *Skeen* observes upon that place, *Reg. Maj.* that *amittere legem terra*, is the same, with *non habere personam standi in judicio*, and they can never be admitted thereafter as Witnesses, neither in Writs, nor in Judgement, *vid. tit. perjurie*. But to the end it may be known which of the Assize alsoilzed, it is by the 9. Article *regul. 1670.* appointed, that the Chancellour of the Assize mark upon the same Paper, upon which the verdict is write, who condemned, and who alsoilzed which Paper is to be sealed, and kept till a Summonds of error be raised.

The Council sometimes rescinds verdicts, without any action of error, *in criminalibus*, as in *George Grahams* case, vvhhere they ordained the verdict of the inquest, vvhwhereby he vvas found to be Art and Part of receipt of stoln Bonds

to be unjust, and restored him against the same; but it may be doubted, whether these vvho are unjustly condemned, may be restored against that verdict, though it be found unjust; seing these vvho are unjustly alsoilized cannot be thereafter pursued, though the absolvitur be found unjust, *per argumentum á contrario*, *vid. titl. of the Council*, vvhere this question is fully debated, and determined.

## TITLE XXIV.

### Of Probation by Confession.

- 1 Probation defined.
- 2 Probation by Confession if judicial, is the strongest of all Probations.
- 3 In what case is an extrajudicial Confession allowable.
- 4 What are the Effects of a qualified Confession.
- 5 The Effects of a Confession emitted before an incompetent Judge.
- 6 How far a Minors Confession obliges.

**P**robation is so fully treated of by the *Civilians*, and *Canonists*, and we differ so little from them, that I shall only treat of it here in relation to our own Law.

I. Probation is defined to be, that whereby the Judge is convinced of what is asserted; and it may be divided in Probation, by Confession, by Oath, by Writ, by Witnesses, and by Presumptions.

II. Probation by Confession is the most secure of all others, and therefore it is said in Law, that *in confitentem nulla sunt partes judicis*, suitable to which, such as confes are oft-times condemned without the knowledge of an Inquest, as I have more fully treated in the Title of Asizes, but because men will sometimes confes a Crime, rather out of Weariness of their Life, than a consciousness of guilt, therefore the Law hath required, that if there appear any Aversion for life *tedium vite*, or any signs of Distraction, or Madness, that these Confessions should not be rested upon, except they be adminiculated with other Probation: as also because Confessions are oft-times emitted negligently, the Confessors thinking that their privat Confessions cannot prejudge them, therefore the Law doth only give credit to judicial Confessions, and not to these that are extrajudicial, & *extra bancum*, which Maxime is stronger with us than elsewhere, because by a particular Act of Parliament, *Ja. 6. Parl. II. cap. 90.* All Probation should be led in presence of the Asize.

III. This Maxime doth admit in *Farinacius*, opinion, many Limitations, as, 1. That if the extrajudicial Confession be adminiculated by other presumptions, it is sufficient, but except the Presumptions be very violent, I cannot allow this Limitation, seing *confessio extrajudicialis in se nulla est, & quod nullum est non potest adminiculari*, and therefore some approve *Bossius* who admits this Confession, though adminiculated only to infer, *penam extraordinariam sed non ordinariam*, for certainly such Prevarication, and abusing of Truth, and Judges deserves some punishment. The second Limitation, is, that if the



the confession be admitted in presence of the accuser, and accepted by him, then it is valid, though extrajudicial, but this I allow not, because it is still extrajudicial, and the confessor knew that he should not die upon such a confession; for which reason likewise, I approve not the third and fourth limitations, which are, that if the extrajudicial confession be *geminata*, and reiterated, or emitted in presence of a multitude, or *ad exonerationem conscientiae*, that then it should be valid, and I remember, that though Major Weir confessed Sodomy, and Incest to Ministers, and Magistrates jointly, for exoneration of his Conscience, in presence of many persons, that His Majesties Advocat took great pains to bring him to a judicial confession, as thinking the former not sufficient: and yet Frazer was condemned upon a confession, emitted before the Assembly at *Aberdene*, and other Noblemen, though retracted, 1641. where this limitation is alledged upon, out of *Farinacius*, and this being represented to the Parliament, they refused to give their opinion, and referred all back to the Justices, who sustained the confession adminiculated, as said is.

The sixth limitation is, that an extrajudicial confession is valid, if upon Oath; but I allow not this, seeing Oaths are not allowed in Criminal cases, nor can the Pannel be forced thereto; and if he swear ultroniously, and undesired, the confession would appear to me, to be suspect, as emitted, either *per furorem, vel ex radio vite*.

The seventh limitation is, that an extrajudicial confession is sufficient, when the Crime confessed consists, *in animo*, as for instance, if it were doubted upon what reason a person accused fled, or shot a Pistol, &c. But I neither allow this limitation, for else it should be as large as the rule, seeing all Crimes require *animum delinquendi*; and yet I think that some circumstances of a Crime, may be proved by an extrajudicial confession, and so this limitation may be true in that sense. All these limitations are largely, rather than exactly set down, by *Farin de reo confesso, quest. 81. Reg. 10.*

Confession though extrajudicial, may be sufficient (if adminiculated) to subject the confessor to the torture; but this is rarely practized with us: But I remember to have seen *Mitchel* lately tortured, upon his retracting a confession emitted by him, in presence of His Majesties Privy Council, and a confession extorted by torture, is in no Law sufficient, so that except it be adhered to, after the person tortured is removed from the Rack, for two or three dayes, it makes no Faith, *Farin de reo confesso. cap. 3.*

The custome with us, is, that the Advocat doth in presence of the Justices, examine the party to be accused, and if he confesse, either he subscribes his confession, if he can write, or else the Justices subscribes for him, or which is securer, makes two Notars, & four Witnesses subscribe; & albeit a confession thus subscribed by two Notars before four Witnesses, was found sufficient, upon the 7. of December 1669. in the case of *Finla Macknab*, who was pursued for Theft, yet it was then alledged, that the confession was not sufficient, and that for these reasons. 1. Because all Probation should by the Act of Parliament foresaid, be led in presence of the Assize; and therefore when the Probation was founded upon confession, the confession should have been originally emitted in presence of the Assize, or at least adhered to before them, & the testimony of two Notars, & four Witnesses, was not equivalent to a verbal confession; seeing they could not thereby know all the circumstances which are necessary to be known, such as whether the confession was voluntar, or extorted, or if it proceeded upon a mistake, or if it was founded upon promise of life, &c. 2. The party who confessed might have emitted that Declaration, upon a confidence that the same could not operate against him, being extrajudicial, as said is. 3. That must be accounted an extrajudicial confession, *qua non emanavit in iudicio*, and this is such; because there was no Court fenced here, nor yet an Assize sworn,

whereas that is only called a judicial confession, which is emitted before those who are Judges, and whilst they are sitting in Judgement, *Boss. iii. de confessis.* 4. The confessor here was an ignorant person, and did not understand the *Scottish* Language, and so might be very subject to mistake; upon which reasons the Assize having demurred; the Justices made application to the Council, but the case being by the Council remitted intirely back to themselves, they did find the foresaid confession sufficient, and *Masknab* was thereupon convicted accordingly, and hanged; but if the confession had only been subscribed by a Judge, I think it could not have been valid, for that were to confound the Office of a Judge, Witness, and Clerk, and would tend to make all Judges arbitrary; so that the life of the Leidges should depend upon one single Testimony, which were very dangerous, especially in inferiour Courts, where it is very well known that persons of very little integrity sit as Judges, and which Judges are oftentimes interested, to get the Pannel condemned, because thereby the Escheat, at least a part of it falls to themselves.

So far doth our Law require judicial confessions, that it hath been debated, that even a confession taken by all the Justices sitting in Judgement, was not a sufficient Warrant, for the Assize to proceed in condemning the party, except the confession had been renewed before them, though the confession it self was subscribed, and the subscription acknowledged, for the foresaid Act of Parliament requires, that the hail Probation should be used before the Assize, in presence of the party accused; but so it is that the emitting of the confession is a chief part of the probation, since Law has laid great weight upon the way and manner, how a confession is elicite, measuring exactly the degrees of constancy, or fear, appearing in the Pannel, as well as considering the motives by which he was induced to confess, and what difference is there *quoad* the Assize, Whether the confession be emitted before the Justices, or an inferiour Judge, or why should not the Deposition of Witnesses, or confessions of Parties, taken by way of precognition proved? and yet thir confessions taken before the Justices prove. But to this it is answered, that confessions emitted in presence of a Judge competent, prove in all Nations, from which the foresaid Act should not be made to derogate, except it designed the same clearly: but so it is, that it is clear by the foresaid Act, that it was not intended, that any Probation that was formerly good, and Probative, should be discharged; but only that the way of using the same should be regulated, and so subscribed Papers are not rejected, for we daily see that Papers prove Treason, and Usury, though they be not subscribed before the Assize; but that Act only discharges a former wicked custom, of carrying in Papers clandestinely to the Inquest, which had not been openly used before the Pannel. Likeas, Assizers do frequently condemn with us upon such confessions.

The second question which may be here debated, is, whether when a person confesses a crime with a quality, and not simply, if his confession may be divided, so that he may be convicted upon the confession, notwithstanding of the quality, except he can prove the quality, this was debated the 13. of March 1668. At which time, one *Dumbar*, being pursued for wounding Collonel *Innes*, confessed that he wounded him, but he did it in defence of his own life, being assaulted by the said Collonel; upon which confession it was alledged, he could not have been found guilty; since a confession can no more be divided, than an Oath, and it is a Brocard in Law, that *quod approbas non reprobas*: As also, seeing the Crime could never be proved, but by the confession, the confession being qualified, was no confession without the qualification, and therefore there was no Probation beyond the quality; I know that the Doctors do in this case, distinguish betwixt such qualified confessions, as are emitted, *sub unico structu verborum*, as if the confession did bear, I did kill in my

my own defence, *vel sub duplici*, as I did kill, but I killed in my own defence in the first, they think the quality cannot be disjoyned from the confession, but in the second it may; yet I think this but a subtilty, for poor persons especially, when they are tryed for their lives, take not such pains to order their expressions, and their design in both is the same, but I approve more that other opinion of these, who think, that such qualified confessions may inter an arbitrary, though less punishment, *penam non ordinariam, sed extraordinariam*, as is asserted by *Decius in cap. cum venerabilis extra, de except. vid. Far. de reo confess. quest. 87 cap. 3.* And albeit I think, that if there were strong presumptions against the confessor, as there was in the above related case he behoved, *eo casu*, to prove that quality of self defence, otherwise than by adjecting a quality; because presumptions transfer the necessity of Probation, upon him against whom the presumption is brought, *Cod. fab. de siccar. def. 6. non scinditur confessio in criminalibus nisi adsint contraria indicia.* Yet I think, that such qualified confessions as this is, which imply a defence, should either prove the defence, or else they should not prove the Libel, and either should be altogether believed, or altogether reprobated, for as it was not the design of the confessor, to bind a guilt upon himself by the confession; So it is to be presumed, that he who is so ingenuous as to confess a guilt against himself, would be likewise so ingenuous as to confess the Truth really, and sincerely, or if he emitted this confession by a secret impulse, of a Superiour Power forcing him to confess the Truth, we may rationally conclude, that the same impulse would likewise have inforced him to confess the Truth in its fullness, and simplicity, & *homicidium in dubio non dolose sed ad defensionem factum presumitur & sic qualitas adjecta habet pro se presumptionem*, *Mascard. de probat. l. 2. conclus. 867.*

I do likewise think, if the quality was not annexed to the first Deposition, that it should not afterwards be received, since it is presumeable, that it would have been adjected at the beginning, if it had been true; every man being more mindful to defend himself, than to confess a Crime: and that notwithstanding of such a quality adjected, *ex intervallo*, the confessor may be punished, *pena ordinaria*, which is also the opinion of *Clarus Quest. 55.*

V. The third Question is, whether a Confession emitted before a Judge, who was not competent to punish corporally, be sufficient for a Judge to proceed who is competent, and this is oft contraverted with us, if a Confession, or Probation led before a Kirk-Session, be sufficient, if it be repeated before the Justices, and the Council being consulted lately by the Sheriff of the *Merse*, concerning a man who had confessed Witch-craft, before the Presbytery, they would not decide it, albeit Lawyers who were Members of the Council, and others were of Opinion, that he should die, except he could alledge a sufficient reason for varying in his Confession, but this is against a received Position amongst Lawyers; *quod confessio emanata coram iudice incompetente non sufficit ad condemnandum.* *Fa in. de reo. confes. cap. 6. licet sufficiat ad torturam & habeat vim extrajudicialis confessionis*, the reason of the foresaid Rule is, that the Confessor knows that he could not dy upon that Confession, and Men will confess many times to free themselves from trouble, or evite Excommunication, who would not acknowledge a Crime, if they were capitally accused; Some also have confessed to Kirk-Sessions, Crimes of which they have been innocent, as Adulteries, for obtaining a Devorce, and Fornication, to obtain a consent of the Father, and whatever may be alledged against extrajudicial, may be alledged against Confessions, before an incompetent Judge: By this also it may easily appear, what should be answered to another Question, which differs little from this, *viz.* If a Confession



of a Crime taken incidently, in another Process, and not taken in Process, wherein the Confessor is pursued for Life, be sufficient to infer Death.

The Lords of Session would not sustain a Confession emitted by a man before the Kirk-Session, *ad exonerationem conscientia*, to operate against him in any other Court; because they thought that this would continue men in impenitency, and retard their repenting; which Decision was much applauded, *licet*, *δεν βηματι ομολογῶντας οὐ καταδικάζουσιν αὐτῶν*.

VI. By the Civil Law, *l. clarum C. de autoritate prestanda*, *Minors* accused, could not prejudice themselves by their own Confessions; but this is innovated by Custom of all Nations, *Boer. decis.* 63. and *Boff. tit. de confessis*; and with us, *Minors* confessing Crimes, are thereupon executed; and I find in the Journal Books, instances thereof, in very young persons, but I think there is much left in this case to the Arbitrariness of the Judge, who should distinguish betwixt such Crimes as fall under Sense, as Murder, and such as principally require Judgement, as Blasphemy, Witch-craft, &c. In which last, hardly should *Minors* be punished, *pæna ordinaria*, upon their own Confession, and scarce after they confess, for a *Minor* is presumed to have no solid judgement.

Though a *Minor* may bind a Crime upon himself by his own Confession, and may be thereupon condemned, and executed: yet whether he may revoke this Confession, and be reponed against the same, because of his Minority, was debated the 28. of February 1676. in the case of a young Boy called *Kennedy*; and that he might be reponed, was urged from these Reasons, 1. A *Minor*'s Lubricity of Judgement might prejudice him as much in Criminals, as in civil cases, and therefore he ought to be reponed against the one, as well as against the other; and it were absurd, that a *Minor* should not be able to bind himself in the value of ten Pounds Scots, and that yet he should by his Confession make himself liable to death. 2. Lawyers are very clear, that a *Minor* may revoke a Criminal Confession, *l. 4. C. de autoritat. prestanda*. *lar. quest.* 53. and *Gomez* gives an instance of a *Minor* being reponed against the Confession of Incest. 3. In this Confession, a *Minor* might have much more easily lapsed into a fatal Error, than in any other cases; the subject matter of this Confession being a contrivance to Poyson by Druggs, and Medicaments, in which, *non constat de corpore delicti*, since the Defunct might have died of another Disease, and as to which, a *Minor* might easily have been mistaken, since to give a solid Judgement, in such cases, or to confess what relates thereto, requires not only more reason, but more Skill and Art, than can be expected from so young a Boy. To which it was answered, that since *Minors* may be punishable for Crimes, they may consequently bind a Guilt upon themselves, by their Confessions, for if the Law did not consider them as so far, *doli capaces*, that they understood the hazard of a Crime, it would not punish them, and if they understood the Nature and Hazard of a Crime, it is unreasonable to think that they may not understand their hazard in confessing it, since in committing Crimes, the Judgement of the Wisest is ordinarily blinded with Passion, and Error; but in confessing, men have time and leisure to be judicious, and serious; and if *Minors* Confessions could not ty them, they might still in absence of Witnesses commit Crimes at their pleasure. 2. Lawyers as well as Reason are very clear, that a *Minor* cannot be restored, except he shew that he was circumvented, or misled by his Confession, as for instance, if he should confess simply that he killed a Man, but should forget to add that he killed him in self-defence, or should confess that he committed Incest; but should forget to add that he was ignorant, that the person with whom he committed the same, was within the degrees that inferred Incest: Which Opinion is to be seen, in *Oddo. 5. Fortia*.

sta. quest. 23. num. 9. Or if he had confest upon the Promise of Indemnity<sup>s</sup> or by the fear of Threatnings, and were able to prove either, and by this just Temperament, the Interest of the Common-wealth, and the Imbecility of Minors are both salved: And therefore when Law, or Lawyers say that a Minor may be restored against his Confession, their meaning only is, that he may be restored if he can prove his Error and Mistake. 3. This being a Confession twice emitted, and adhered to, and adminiculated by the Confession of other dying persons, who could not clear themselves by fying him, there can no doubt of its Truth remain with any disinterested person. This case was not decided, but I conceive that a Minor cannot be restored against his own Confession, except he shew, wherein he was either circumveened, or mistaken. And if a person past 21 years of Age, can prove, that he has confest what was not true, he ought to be restored: as for instance, if he can prove that the man whom he confest he did kill, is still alive; In which sence I take l. 1. §. D. severus. ff. de panis. D. severus rescripsit, confessiones reorum pro exploratis criminibus haberi non oporteri. And when the Eclog. says, cap. 4. περιμολογησάντων. suitable to l. 4. ff. de confessis, ὁ τὸν ἐκτεθνήκα δολοῦ, ἀρχὴν μολογῶν, ὅτι καὶ μὴ ἀνέλεν ὡς ἐμολογᾷ ἐκ τῆς αἰτίας, qui servum occisum interemisse se fa'etur, licet non occiderit; ex confesso tenetur. This is to be so interpreted, that a man past 21. may be executed upon his own Confession, without enquiring whether what he confest be true. But it doth not follow, that if the Confessor can prove he confest what was false, he ought not to be reponed.

## TITLE XXV.

### Probation by Oath, by Write, and by Presumptions.

- 1 In what cases is a Pannel obliged to give his Oath.
- 2 Whether a Pannel is obliged to depone, when the Judge declares that his deponeing shall not infer a corporal punishment.
- 3 In what cases can Crimes be proved by Write, and whether a Write that is null can prove a Crime.
- 4 How far can a Crime be proved by Presumptions.

1. **P**ROBATION by Oath, is not regularly admitted in criminal Cases, for the Pursuers Oath is never probative, even in civil Cases, except it be adduced in Supplement; but the Oath of Supplement by the Pursuer, is used upon no occasion in Criminals: Neither is the Defender forced to give his Oath in Criminals, as he is in civil Cases, both because it is unjust, to force a man to condemn himself, and because it is most probable, that he who is accused for a Crime, would hazard his Soul by Perjury, to redeem his Blood, by an Oath. But because the excessive love which we bear to Life, is the occasion of this exemption; therefore where the punishment is not corporal, & corporis afflictiva, the Defender will be forced sometimes to give his Oath, as in the case of Riots, and Blood-Wyts. Sometimes likewise the Law,

because of the scantness of the Probation, obliges him who is accused to give his Oath, as in the case of Usury, which is a Crime odious in it self, and clandestinely carried on, *Ja. 6. cap. 247. Par. 15.* And in the case of Simony, *Ja. 6. Parl. 21.* yet neither of these Crimes are corporally punished, and therefore these Rules may still hold. 1. That Probation by Oath of the Defender, is never allowed by Law, neither *ubi pena est corporis afflictiva, nec ubi infamia irrogatur, quia nemo tenetur probare suam turpitudinem, & fama & vita quoad hoc equiparantur.* 2. That a person accused may be obliged by an express Law to depone, though the Crime for which he is accused, may infer Infamy. 3. That no Law should force the Defender in a criminal Process to swear, where the Crime may infer death, nor have we any such Law in our Kingdom.

II. It is oft contraverted, both in the Council, and Criminal Court, whether though the Crime be in it self, such as deserves a corporal punishment, yet if the Pursuer, and His *Majesties* Advocat likewise declare, that they will not pursue the same criminally, & *ad penam corporalem infligendam*, if *eo casu*, the Defender may not be forced to depone, which question may be resolved by these conclusions. 1. That though the Pursuer declare that he will not insist criminally, yet that Declaration is not sufficient, because His *Majesties* Advocat may pursue. 2. Though His *Majesties* Advocat concur with the Pursuer, in the Declaration; yet it is not sufficient seeing His *Majesties* Officers cannot prejudge His *Majesty* by any Declaration of others, for else they might by such Declarations as these, in effect remit crimes. 3. The Declaration of the Council is not sufficient, because they may not prejudge a criminal Action, which may be intended before the Justice Court, as was found in the case of some Gentlemen, and others, who being pursued before the Council as *Plagiaries*, for taking away *Anna Gibson*, it was found by the Council, that they were not obliged to swear, though both the Pursuer and Advocat declared they should never be criminally pursued. 4. I conceive that neither the Declaration of the Pursuer, nor Defender, even in a criminal Pursuit before the Justices, though agreed to by the Justices, would not be sufficient to force the Defender to swear; for I think, that though the Defender should, *eo casu*, upon Oath deny his guilt, that he might be of new pursued, and convict upon clear Probation; for his Majesty, and the publicks Interest can never be prejudged by any Declaration of his Officers, nor can any remit Crimes, as I said formerly.

III. Crimes do not ordinarily use to be proved by Write, and when they may be so proved, there is little difficulty as to the Probation; only it may be observed, that it was found in the Crime of Falshood, pursued against Captain *Barclay*, that a Write may be proved false, without Production of it; and in *Purdies* case, that a Discharge was sufficient, to prove Usury, though it wanted both Writers Name, and Witnesses, seeing the Pursuer offered to prove the Subscription by his Oath; but is observable that Pannels are in Usury obliged to swear and therefore it may be doubted, whether a Write not subscribed before Witnesses, doth prove a Crime, since all Writs of importance, are by Act of Parliament declared null, if they want the Writers Name, and Witnesses, and if they be not believed; *quoad*, a civil effect, much less in a Criminal; nor is the Pannel here obliged to make up the same by his Oath, as in civil Cases: And yet the Marquess of *Argile* was convict of Treason, upon Letters written by him to General *Monck*; these Letters being only subscribed by him, and not Holograph, and the Subscription having been proved, *per comparationem literarum*, which were very hard in other cases; seeing *compara-*



*tio literarum*, is but a Presumption, and mens hands are oft-times, and easily imitated, and one mans Write will differ from it self at several occasions.

IV. Presumptions are divided, in Presumptions that are violent (for strong Presumptions are so called) and these that are not violent; they are likewise divided, in *presumptiones juris*, & *presumptiones juris & de jure*.

Whether Crimes may be proved by presumptions, is much contraverted, both in Law, and Practique, and that they cannot be proved by presumptions, is inferred from these reasons, 1. Presumptions are only founded upon verisimilitude, and what may be, may not be; whereas all Probations, especially in Criminals, should be infallible, and certain, & *conclusio semper debet sequi debilem partem*. 2. If Crimes could be proved by presumptions, Judges would be arbitrary in all cases, seeing the Law cannot determine the number, and weight of Presumptions, as it doth in other Probations. 3. The Doctors universally conclude, that Presumptions do not prove Crimes, as is clear by *Mascard. Farin. &c.* Upon the other hand it may be argued, that a Crime may be inferred from Presumptions, and that for these reasons, 1. *l. ult. Cod. de probationibus ubi dicitur posse crimina vel idoneis testibus vel apertissimis documentis vel indicis indubitatis probari & l. 2. ff. quon. appell. non recip. ubi jubetur curialis observare ne quis homicidarum Adulterorum, &c. Argumentis convictus, testibus superatus, vel voce propria confessus audiatur appellare*. 2. Since Witnesses are only believed, because it is presumed they will not damn themselves; why may not other Presumptions be likewise received? 3. Presumptions are in many cases allowed as a sufficient Probation, as the presumption of Cohabitation, after the parties are discharged, is sufficient by Act of Parliament; to infer Adultery. 4. The Depositions of witnesses are oft times founded upon Presumptions, as when they depone upon *dolus malus*, ebriety, or any other thing which depends upon Acts of the mind. 5. Many have been condemned upon presumptions, as *Janet Brown*, who was convicted for Murder of her own Child, upon presumptions, and hanged accordingly, the 25. of June 1614. and *Scot* was convicted, and hanged for killing of *Drumlanries* Sheep, the 20. of February 1616. And after a solemn debate, how far Presumptions could prove in Criminals, in *Alexander Kennedies* case, he was convicted, and hanged for falshood, upon Presumptions; Anno 1662.

This difficulty hath forced some of the Doctors to conclude, that this case is arbitrary; and others to conclude, that Presumptions may infer, *penam extraordinariam, sed non ordinariam, Cod. fab. tit. de pen.* which last opinion, is upon the matter coincident with the first; for in arbitrary cases, the Judges can never proceed to death, and it seems that both these opinions are well founded, because not only the committing of Crimes, but even the giving of offscandal, and the doing that which is like a Crime, deserves to be some way punished; but this arbitrariness should, only in my opinion, be allowed to the Council, who are a supream Judicatory, and are in such extraordinary cases tyed to no expresse Law.

# TITLE XXVI

## Probation by Witnesses.

- 1 *How Witnesses are cited with us.*
- 2 *Who are testes ultranei.*
- 3 *What Witnesses are not worth the Kings Unlaw.*
- 4 *When women may be admitted to be Witnesses, and when not.*
- 5 *How Minors are to be admitted Witnesses.*
- 6 *Persons guilty of Crimes cannot be admitted.*
- 7 *Persons within degrees defendant, are not admitted, and who these are.*
- 8 *Domestick-servants, when admitted.*
- 9 *Movables Tenements.*
- 10 *Socius criminis.*
- 11 *Defenders cited as Parties.*
- 12 *What time is considered in the habitory of a Witness.*
- 13 *Whether Witnesses inhabile, may be received at his Majesties instance.*
- 14 *Who are testes singulares.*
- 15 *The contrariety in Depositions considered.*
- 16 *Causa scientiæ.*
- 17 *Witnesses, ad futuram rei memoriam.*
- 18 *It is now necessary to give in a List to the Defender of the Witnesses Names who are to be led against him.*
- 19 *Absent Witnesses how punished and compelled.*
- 20 *What Number may be cited for proving each Crime.*

**I**F the Crime be pursued by raising of a Summons, that Summons contains a Warrant to cite Witnesses ; but if the Pursuit be by way of Inditement, the Justices grant Warrant by Precept for citing of Witnesses.

At the day of Compearance, the Pursuer gives in with his execute Summons, Executions likewise against the Witnesses, and if the Executions against the Witnesses, be not legal, the Dyer is deserted ; But if the Witnesses be lawfully cited, and compear not, of old, there was a Warrant given to apprehend them, and the dyet was continued, but now there are formal Letters of Caption, given under the Signet of the Session, and not of the Justice-Court, and the Letters are still raised by the Justice-Clerks Deput, who is the ordinary Clerk of Court ; And if the Sheriff refuse to apprehend the Witnesses by vertue of the Caption, the Letters will be direct against himself, as in civil cases, and this was first observed in the cases of *Mackalla* against *Lindsay*.

After the Justices have found that the Pannel should go to the knowledge of the Inquest, he asks the Pursuer what way he will prove his Libel : and if the Probation by witnesses be chosen as the manner of Probation to be used

II. The

II. The Justices desire, the Clerk to call the Witnesses, and if any be given in, in the list, against whom there is no formal Execution; it is alleged they cannot be received, and this is the first objection against the witnesses, and this is founded upon this reason *viz.* that he who offers himself to depone, without being lawfully cited, is presumed to be too desirous to depone, and so to have malice. These the Civil Law calls *testes ultionis*, yet I find that the Justices sometimes receive witnesses cited, *apud acta*, as *Alexander Forrester* against a Witch, the 3. of August 1661. So though they will not receive a witness, who appears upon an unlawful citation, and which they know to be unlawful, yet they will receive some, though not at all cited; for the first show a compliance, but not the last, all the objections against the witnesses are discussed before they be sworn, for it is below the Majesty of an oath, to administer the same unnecessarily, before it be known whether the person to whom the Oath is to be administered will be received.

To object against a witness in our Law, is called to *cast a witness*, or to *set him*; and by the Doctors it is called to *repel a witness*, but because objections against the witnesses, or *oppositiones contra testes*, as *Farinacius* calls them, are so largely treated of by him, and others, I shall therefore only take notice of some particular objections, which are mentioned, and made use of frequently in our Law, and practice. And in Law these objections are divided into such as are used *contra personas testium*, and these which are used *contra dicta testium*, I shall therefore first treat of these objections which are used *contra personas testium*.

III. Witnesses are not admitted with us, if they be not worth the Kings un- law, which we interpret to be ten pounds; and because no man can know the value of another's Estate, this objection is found therefore only probable by the Oath of the Witness himself, as was found in the case of *Rucehead* against *Muire* the 9. of December 1668. But this seems strange; for since the Law is jealous that he will depone unjustly, why it should believe him as to his own quality; and therefore I think that in Criminal cases, when the hazard is so great, the being known to be an actual Beggar, should be sufficient, *per se*, to cast a Witness, without referring the same to the witnesses Oath.

This objection is founded upon the presumption, that such as are poor, are liable to impression. And such as are poor are expressly repelled from being Witnesses, by the 34. cap. stat. 2. Rob. And they were likewise repelled by the Civil Law.

IV. Women, *regulariter*, are not witnesses, neither in Civil nor Criminal cases with us, nor should they make as much Faith with us, *in criminalibus*, as is allowed by the Civil Law, and Doctors; seeing with us they are excluded from being witnesses even in civil cases, *ergo a fortiori*, they ought to be rejected in Criminal cases; for albeit the Doctors allow them sometimes to prove in Civil cases, yet they reject them in the same causes, when they are criminally pursued, as in *Furto &c.* *Farin. quest. 56. num. 31.* and by an express Act. 1. August 1661. The Justices ordained, that no women should be examined as witnesses in Theft, for the future, except *ex officio & cum nota*: and that same day they received *Elizabeth Watson*, as witness in Theft against *Bruntfield*. 2. Women are sometimes received witnesses in some cases, *ob atrocitatem criminis*, as in Treason, by an express act of Sederunt 1591. And in Witch craft, most ordinarily, as is to be seen by the Books of Adjournal, and particularly in the Process of *Margaret Wallace*, the 20. of March 1662. where *Margaret Graham*, and *Marion Wear*, are received witnesses. 3. They are admitted *in criminibus domesticis*, because of scantness of probation; and thus they were received against *George Saintoun*, who was accused for murdering his own wife, within his own house, 21. August 1664. 4. Women are received witnesses, where women use only to be



present, as in the being brought to bed, murdering of Children, & in *partu suppositio*, &c. very many instances whereof are to be seen in the Adjournal Books. And yet *Farin. quest. 49. sayes mulier non potest esse testis, & quo ad suppositionem partus si inde agitur criminaliter, ad suppositionem corporaliter puniendam*: And by these we may conclude that women are not *regulariter* admitted witnesses in Scotland. Likeas by the 34. *cap. Rob. 1.* These are expressly excluded from witness bearing; yet *Mathews* concludes they may be received witnesses, *ex loc, quod mulier adulterii condemnata non admittatur, ergo in aliis mulieres admitti debent*; But this opinion is contrary to all the Doctors *vid. Farin. quest. 59. casu. 1.* where he gives it for a rule, that *mulier in criminalibus testis esse nequit*: which rule extends so far that according to his judgement, three or more women cannot prove a Crime, *num. 29.*

The reason why women are excluded from witnessing, must be either that they are subject to too much compassion, and so ought not to be more received in Criminal cases, than in any Civil cases; or else the Law was unwilling to trouble them, and thought it might learn them too much confidence, and make them subject to too much familiarity with men, and strangers, if they were necessitated to vague up and down at all Courts, upon all occasions.

V. *Minors* if they be past fourteen years of age, and no otherwise, may be admitted to be witnesses, by the foresaid Act of K. Robert, and it being alledged in the Process of *Margaret Wallace*, 1622. That *Margaret Graham* could not be received a witness, because she was not past eighteen years of age, this was repelled, because a Testificat bore, that she was past fourteen years of age, and might be man'd. The reason of this objection, is, because *Minors* understand not to answer all circumstances, which must be necessarily considered by the Judge; nor yet the nature of that Oath, which should overawe them, and they are very subject in their youth to corruption; a clear instance whereof, I saw my self, in a little boy against *Towie*, who after he was received, did first depon many improbabilities, and seemed terrified with every question, and thereafter confest that he was bribed, with a very small and childish bribe. In many cases likewise, witnesses are to depone upon that which requires judgement, as in proving self-defence, ratiabition, &c. And in these cases, it is requisite that the deponer be of a more advanced age than fourteen.

VI. By that Act likewise of K. Rob. such as are Furious, Adulterers, Robbers, Thieves, Perjured, Scourged, and Servants cannot be received witnesses: nor yet Laiks against Church men, nor yet Church-men against Laiks: whereas according to the Canon-Law, *cap. de catero decret. de testib.* Laiks are forbidden to be received against Church-men, *sed non contra*. The reasons of which constitution, are given to be partly the reverence due to Church-men, and partly the hatred whereby Laiks do persecute them; but this objection is justly reprobated by our custome: by which likewise Servants are received to be Witnesses, notwithstanding of the former Law against it; but not for their Masters: but whether he who hath redeemed himself from Justice by a Remission, should be received a witness, may be contraverted? and that he should not be received, may be argued, 1. Because of this Law of K. Rob. which doth expressly repel him. 2. A Remission takes not away the guilt, but is only a defence against the punishment, *l. Fin. C. de gener. absolut*: And *semel malus semper præsумitur malus*, which wicked deposition cannot be altered by a Remission; and since the King cannot make a man good, it follows, that he cannot make him a sufficient Witnesses. 3. It hath been found by several Decisions, that a person convict, and brought off by a Remission, *redemptus à justitia*, as this Law calls him, hath been therefore fer, from

from being a witness, as in the case of *Tosuch*, who was condemned as a false Notar, and was thereupon set from being a witness, in the Process, for burning the House of *Frendraught*; and yet I my self have objected this against an *English* Captain, in *Argiles* case, but it was repelled But to reconcile these two opinions, I think we should distinguish betwixt such as make use of the Remission, before they be convict, and these who are convict, and thereafter make use of the Remission; for these who propone upon the Remission, do *eo ipso* acknowledge the guilt; yet that it is only *fictione juris*. And therefore the foresaid Law says, copulative that *convicti, & redempti à justitia non possunt effestestis*.

Guiltiness which casts a man from being Witness, must be proved by a Sentence, and it was not found relevant, that the Theft was offered instantly to be proved, the 10. of *February* 1673. in *Ashtintillies* case; but it would appear, that sometimes the Theft is so recently committed, that there could be no time for convicting him; and yet it were hard that a person so guilty, should be received. The dependence also of a criminal pursuit against a Witness, should cast him, if it was intended before his Citation, to be a Witness, else every Witness might be cast, by intenting a Criminal Pursuit against him.

VII. These within Degrees defendant, by Blood, or Affinity, are likewise repelled by the foresaid Act. Degrees defendant, are by our Law the fourth Degree, or Cousin Germans, as is expressed in the foresaid Chapter, and this Term comes, in my opinion, from the French Word, *defendre*, to forbid, so that Degree *defendu*, is the true expression, though we say, *defendent*, by corruption of the Word. Excommunicat persons cannot by that Law be Witnesses, nor such as are incarcerat: yet *de practica* such as are incarcerat, are received, except they can be cast by some other Objection. Nor such as are accused for a criminal Cause, during the Dependence of the Process: nor such as are of the Pursuers Council: which Objection is, *de practica*, called the giving of partial Counsel, and this is only proved by the Defenders own Oath, properly; yet the being present at a Consultation with the Pursuer, or the solitting for him, are likewise Branches of partial Counsel, and are probable by Witnesses.

VIII. Domestick Servants cannot be received Witnesses for their Masters, albeit they may against them, but if they be not Servants the time of the Deposition, they may; except their Master hath put them away, *dolose*, that he might use them as Witnesses; but it may be contended, that if he put them away since the Citation, to depone, they cannot be Witnesses. Nor removeable Tennents, but Tennents having Tacks, or Cottars of their Tennents, *de practica*, are still received; because the Law presumes they are not so liable to the Masters Impressions; and yet it is generally said in the former Law, of *K. Robert*, *nec aliquis tenens terram de eo ad firmam, vel ad annuum redditum*, and *Farin. doth*, *regulariter*, conclude, that *Colonus non admittitur ad testificandum pro domino suo*; and yet *Glossa ad cap. in literis extra de testibus* adheres to the Distinction allowed in our practice, and concludes, that *aut coloni sunt tales quibus imperare potest dominus, & tunc repelluntur, aliàs non, sed instantum creditur*. *Farin. Is* likewise of opinion, that though Vassals who are not subject to the Jurisdiction of their Superior, may be received Witnesses for him; yet that where his Superior, *habet merum, & mixtum imperium*, in vassallos, the Vassal there can be received Witness for him, but with us, Vassals of Regalities, are received Witnesses for the Lord of Regality, which seems very unjust; seeing as *Farin.* there observes, *Dominus in tales vassallos minacem terrorem, & timorem incutere potest*.

IX. Though moveable Tennents cannot be Witnesses, yet Cottars may, as the Custom now runs, whether they be Cottars to Tennents, who are not receiveable, or not, 11. December 1632. For our Custom thinks Cottars independent; yet I conceive if this were well debated, it would be found, that where the Tennent is not receiveable, neither can his Cottars, especially in criminal Cases, where exact probation is requisite; for it is not imaginable, but that the Cottar will stand in aw of him, whom his Master fears.

X. He who was sharer in the committing of the Crime, with the person accused, or *socius criminis*, cannot be received a Witness, nor yet he, *qui fovet consimilem causam*, or who may win, or gain by the event of the Pursuit; but in Falshood, *socii criminis*, are received Witnesses; because without these, that Crime could not be proved; and thus Barclay being accused for forging a Bond, and Disposition, the Witnesses who subscribed the same at his desire, without seeing the principal Party to whom they are Witnesses, subscribe, were received to prove the Falshood, and the Forger of the Bond was also admitted;

In the Pursuit of Charles Robertson, it was alledged, that *socii criminis* might be Witnesses, where the punishment was pecuniary, & *sententia non irrogabat infamiam*; for the reason why *socii criminis* were not admitted, was, because they were infamous, & *intestabiles*; to which it was answered, that the reason was, because they were under fear of the Pursuer, and there was greater reason to repel them in small Crimes, than in *atrocioribus*; seeing in these lesser Crimes, the Common-Wealth was not so much concerned, which was the reason why the strictness of probation was relaxed in Treason, &c. And in these the Pannel might be forced to depone; but could not in greater Crimes. In respect of which Answer, the Justices the 9. of March 1671. would not admit *socios criminis*, though in a Delict, which was only punishable by a pecuniary Mulct, and though they were not found to be *socii*, by a Sentence, seeing their being *socii*, was offered to be proved by their own Oaths, and by the foresaid Statute, *socius criminis*, and *infamis* are two different Objections, vvhich had been unnecessary, if *socius criminis* had been only repelled, because he was *infamis*.

XI. It is ordinary for any person who is pursued for a Crime, to raise a Reconvention, and to call therein all such as Defenders, whom they think may be led as Witnesses against them; and it is ordinarily controverted, whether in such mutual Pursuits, *seu antecategoriis*, may be received as Witnesses? To which the solid Answer is, that though it seem that they may; because else it should be in the power of the person accused, to set all such Witnesses as may be led against him; seeing he may raise a Reconvention, or it may be intent the first Criminal Pursuit, upon design, and call all these as Defenders; yet it is thought they cannot be received Witnesses, until that Process depending against themselves be first discussed; by the event whereof, it may appear, whether that Pursuit be just, or unjust: And by the former Law of K. Robert, none can be received Witnesses, against whom there is a criminal Pursuit intended. Notwithstanding of all which, I have seen the Lords receive Witnesses in this case, but *cum nota*.

Witnesses who may be received, are called *testes habiles*, and they are distinguished, in *idoneos*, or sufficient Witnesses, or *testes omni exceptione majores*, who deserve yet a further Degree of Faith, and against whom there is not only no Objection, but even no Suspicion, & *testes optime opinionis*, who deserve the highest degree of Trust; Sometimes likewise, witnesses are received, though they be not altogether *habiles*, and these are called with us, *testes cum nota*, who in our Law prove not fully, either the Libel, or Defence; albeit by the Civil Law, *testes inhabiles*, were admitted to Exculpation, or prove a Defence proponed for the Pannel, if there did not ly Presumptions of guilt against them.



XII. If a Witness was not *habiles*, to be a witness, when the Crime was committed, he will not be admitted to be a Witness, though he be *habilis*, & *major*, at the same time of his Deposition; because a Witness must be such as did then know what was done: thus *Wilson* was repelled, in the Process against *Cask*, the 10. of September 1661.

XIII. It is oft-times controverted with us, if such Witnesses as could not be received at the instance of the Accuser, may be received at the instance of his Majesties Advocat, which Question may be answered by these Conclusions. 1. If the Objections against the Witnesses be such, as make the Witnesses *inhabiles*, as that he is a *Minor*, or infamous, then these Witnesses cannot be received at the instance of the Fisk. 2. If the objections be such as tend to cast the Witnesses, meerly because of his Relation to the Party wronged, as that he is Servant, or within degrees defendant to the party wronged, then though the Party wronged insist not; yet these Witnesses cannot be received, if any Advantage may accres to the Party wrong'd, by their Deposition; except he declare that he shall thereby reap no Advantage, and except the Crime be such as did no affront to the Party injured, for *eo casu*, it is still presum'd, that his Relations will retain a privat Grudge, or Malice, whereupon they may prejudice in their Depositions, both the Truth, and the Defender; and yet ordinarily with us the Relations of the persons injured, are received at the instance of the Kings Advocat. Thus *Neilson* was received against *Margaret Wallace*, for Witch craft, though he was Brother in Law to *Nicol*, who gave Information in the Dittay, because the Summonds was not raised at his instance, the 20. of March 1622, and yet in that same Process, *Stirling* was not admitted to be an Affizer, because he was Brother in Law to *Muir*, who was one of these who was alledged to be *maleficiat* by her, albeit the Libel was not raised at the instance of *Muir*, or any of his Relations, which I think both irregular, and dangerous.

Albeit these be relevant Objections against Witnesses, yet if the Proponer of the Objection, cite them also at his own instance, *eo ipso*, he acknowledge the Witnesses to be, *habiles testes*, but sometimes he may notwithstanding, propone Objections, even against those himself cites, *v.g.* though I cite a man to be Witness for me, yet I may set him from being Witness for my Adversary; because he is Brother, or Servant.

XIV. The Objections, *contra dicta testium*, are *singularity*, and *contrariety*, and the not giving a sufficient *causa scientie*.

Singularity is, vvhhen the Witness vvhho depones, hath no concurring Witness, and this Singularity is divided, *in obstativam*, *adminiculativam*, & *diversificativam*.

*Singularitas obstativa*, is, *in actu non reiterabili*, an instance vvhhereof they gave in *Susanna*, and the two Elders, vvhho deponed upon the same Adultery, but differed in the place, and therefore did not prove. And it is a general Rule, that where the Crime is not reiterable, or reiterated, that two Witnesses varying upon the time, or place, as if one should say, a Man vvhere murdered at *Edinburgh*, and the other at *Haddingtown*, these Depositions could not be conjoyned, for proving the Murder.

*Singularitas adminiculativa*, is, vvhhen the Witnesses do not concur in their Depositions, yet they are not contrary, and the one assists the other, as in the proving that a Horse vvvas stolen, one should depone that he savv the Thief go in vvvithout a Horse, another savv him take the Horse, but no more, vvhich singularity in Depositions, doth not hinder the Witnesses to prove, neither by our Practiques, nor in the opinion of the Doctors.

*Singularitas diversificativa*, is, vvhhen Witnesses depone different Acts, as in a Crime vvhich is reiterable, and thus the Adultery against *John Maxwell*,

was found by the Lords to be sufficiently proved, though one of the Witnesses deponed only upon an Adultery committed at one time, and another, of an Adultery committed at another time, *February 1666.* for the Lords thought that if one witness should peep in through a hole, and see Adultery committed, and thereafter another witness should peep in, and see the Adultery likewise committed, yet they were *contestes*, and did prove sufficiently, *etiam ad pnam mortis infligendum*, as was found in the probation of Adultery; led against George Swintoun; ( but in my opinion ) this case differs from the former, for in George Swintoun's case. both the witnesses concurred in one Act, but they did not so in the case of John Maxwell, and therefore, though the depositions were conjoynd against him, by the Lords, for sustaining a Decreet of Divorce; yet it were hard that these different Probations could have been conjoynd, if the case had been criminally pursued, as is clear by *Farin. quest. 64. de opposition. contra exam. testium num 55.*

XV. Witnesses who depone things that are contrary, do not prove, if that contrariety be in things that are substantial, but though they differ in some extrinseck circumstances, yet they prove, & *verba sunt improprianda, ut testes concordentur, & etiam concordari debent aliquando à judice per interpretationem suppletivam*, but though contrariety be a great defect in depositions; yet too formal an agreement amongst the witnesses, who depone all in the very same words, & *per prameditatum sermonem*, is suspect, *v. g.* If two, or more witnesses should tell over a long story, in the very same words, as *Farin.* well observes, *quest. 64 num. 24.*

XVI. Lawyers have taken so great pains, to secure the lives of poor Pannels, that they will not believe witnesses, though concurring, except they can render a sufficient *causa scientia*, if the thing deponed fall under sense, as the seeing a man killed. If it fall not under a sense absolutely, as that a person was drunk, mad, or reputed a thief, &c. Betwixt which two, there is likewise this difference, that in these things that fall not under sense, the *ratio scientia* must be given, whether it be asked or not, because in effect, it is the *ratio scientia*, and not the Deposition, which proves in that case.

Witnesses must in our Law be received in presence of the Pannel, and Affize, that the Pannels presence may overawe the Deponer, and that the Affize may judge by the Deponers countenance, gestures, and assurance, how far he should be believed, and Advocats are to be present, that they may interrogate upon emergents, and this is much juster, than the Laws of other Nations are, who allow neither Advocat nor party to be present, whilst the Witnesses depone, *Gomes. de delict. cap. 1. num. 65.* And in this also we agree with the Civil Law, *l. Custodias ff. de publ. judiciis.*

XVII. Witnesses are sometimes received, *in criminalibus, ad futuram rei memoriam*, for the Defender, but never for the accuser; and that because the accuser might blame himself, for not pursuing sooner, which is not in the Defenders power, and *testibus non testimoniis creditur*, whereas Depositions, *ad futuram rei memoriam*, are only *testimonia*; And yet with us, the Justices sometimes declare in Court, when they continue dyets, that they will receive the Deposition of Witnesses to lie *in retentis*; but this form is not allowable in my opinion; except both parties consent; because by Act of Parliament, all probation should be led in presence of the Affize.

XVIII. It was a defect in our Law, that albeit it allowed the Pannel to object against Witnesses; yet it did not allow him to cite Witnesses to prove his objections: as for instance, if the pursuer adduced a Witness, who was convicted of Theft by a sentence at *Aberdeen*, this would be relevant, but the Pannel could not prove his exception, both because the dyet was peremptor, and because he was not allowed to have a diligence for proving thereof; for remedy

dy whereof, by the 11. Article of the Regulations of the Justice-Court, it was appointed, that when the Libel, or Summonds of Exculpation is execute, the names of the inquest, and Witnesses should likewise be given to the Defender, so that he might know vvhhat to object against them, and diligences are thereby allowed him for proving his objections. Against this Article it was murmured, that first this vould be very difficult; for the pursuer could not know vvhhat Witnesses vvere to be adduced, and much less vvhhat Assizers might be present, for they could not assure their attendance. 2. This might prove a mean of corrupting Witnesses, and Assizers, vvho, if known, might be practised.

But to these it may be answered, that no man should raise a criminal pursuit to vex men in their Fame and Fortune, till he were secure that he could prove his Libel, which infers necessarily that he knew the Witnesses who were to be adduced; And seeing the Pursuer might cite 45. he might be confident fifteen of them would obey, and be so wise as to evite the Penalty: And this Objection would tend much more against all Continuation of Assizers for a whole year, which is very ordinary. To the second it may be answered, that either the Witnesses to be adduced, are honest, and then there is no fear of practising, or they are false and obnoxious to Corruption, and then they should not be received at all: And it were inhumane that a mans Life and Fortune should be laid open to the Depositions of these, whom the Law durst not allow to be known, for fear of being bribed, and corrupted. And this Inconveniency could hardly have been evited before thir Regulations, for ordinarily the Defender knows who were present, and needed suspect that none will be adduced, who were not present. As likewise when Dyets are continued (as frequently they were) the Witnesses were still known, but these Jealousies are by very much less dangerous, than the Inconveniences which attend the not allowing the Pannel to know what Witnesses are suspicious, and should be declined. And our Law should either not have allowed Objections against Witnesses, or else should have allowed a Dyet, and means for proving them: *nam quando aliquid conceditur omnia concedi debent sine quibus ad hoc perveniri nequimus.*

XIX. If Witnesses compeared not of old, the dyet was immediatly deserted, but now Caption will be direct against them, and the dier will be continued, for it is unreasonable that the Pursuer or Fisk, should be prejudged by the Contumacy of the Witnesses; but if two compear, it may be doubted if *eo casu*, if the dyet should be continued, for two are sufficient for proving the Libel, but because moe Witnesses than two are oft-times requisite, there being many Circumstances to be proved, therefore it seemshard, that the Dyet should not be even *eo casu*, continued: And at other times there may be Objections which may cast such as are present, and therefore the Justices continued the Dyet against *Braco Gordon*, the 11. of November 1671. Because the Defender would not declare that he would use no Objections against such as were present.

Though *regulariter* the Justices vwill grant Warrant to apprehend and secure Parties vvho are suspect of Crimes, till they find surety; yet they refused to secure or attach, such as vvere cited to be vvitnesses lest thereby they should discourage Men from compearing to bear Witness, December 1672. In answer to a Petition given in by the Marquis of Montrose Tennents.

XX. By the Custom both of the Council, and Criminal Court, ten Witnesses are allowed to be cited upon every separat matter of Fact; and Article of the Libel, and no moe, to evite Confusion; nor vvants there Precedents for the Number of ten in this case, since *cap. 5. legis Mammiliae, inque eam rem is*



qui hac lege iudicium dederit testibus publice duntaxat in res singulas decem. denunciandi potestatem facito : and I find in *Valerius probus*, this to be an Article, *edicti prout testibusq; publice duntaxat decem denunciandi potestatem faciam* to vvhich Number Witnesses are stinted, by a Statute of *Lewis the 12 of France*, *Langlaus. semestr. lib. 3. cap. 5.* from vvhich Statute, our Custom seems to have flow'd.

## TITLE XXVII.

### Of Tortour.

- 1 By whom can Torture be inflicted in our Law.
- 2 Torture purges all Presumptions.
- 3 Whether may persons who are condemned, be thereafter tortured.
- 4 Who are excused from Torture.
- 5 How should such be punished, who Torture unjustly?

I. **T**orture is seldom used vwith us; because some obstinat persons do oft-times deny Truth, vvhilst others vvho are frail, and timorous, confess for fear, vvhat is not true, and it is competent to none, but to the Council, or Justices, to use Tortour, in any case; and therefore they found, that Sir *William Ballenden*, as a Captain, could not Torture, though it vvas alledg'd, that this vvas necessar sometimes, for knowving the Motions of the Enemy, and might be necessar, and allow'd in some cases to Souldiers, for the good of the Common-Wealth. And the Council are so tender in Torture, that though many Presumptions vv ere adduced against *Giles Thyre*, *English-man*, suspected of Murder, and Adultery, they refused to Torture him; albeit it vvas prest zealously by his Majesties Advocat.

II. It is a Brocard amongst the Doctors, that he vvho offers to abide the Torture, purges all other Presumptions, vv hich can be adduc'd against him; and yet *Alexander Kennedy*, being pursued for forging some Bonds, and nothing being adduced for proving the Crimes, save Presumptions, offered to abide the Torture, but this vvas refused.

Torture likewise being adduced, purges all former Presumptions, vv hich preceeded the Torture, if the person Tortured, deny what was objected against him; but yet he may be put to the knowledge of an inquest, upon new presumptions, as was found after a learned debate, in the case of *Tosboch*, who was Tortured, for the alledg'd burning the house of *Fren-draught*, *August*, 1632, for it was alledged, that Torture is intended for bringing the verity to Light, and as he had been condemned, if he had confess, so he should be as-soilzied when he denys, else no Man would endure the Torture, if they vv ere not perswaded, that upon denial, they should be cleared, but would confess, and not endure so much Torment unnecessarily; so that the Inquisition would be the occasion of much sin, and make Men die with a lie in their mouth; and therefore Torture is called, *probatio ultima vid. Clar. quest. 64.* Yet

Spot

Spot, Maxwell of Garrery, and others were condemned after Torture, upon other Probation than was deduc'd before the Torture.

III. I remember it was debated in Council, Anno 1666. If the West-countray-men who were condemned for Treason, might after Sentence be Tortured, for clearing who were their Complices, and it was found that they could not, *nam post condemnationem, iudices functi sunt officio*; yet all Lawyers are of opinion, that even after Sentence, Criminals may be Tortured, for knowing who were the Complices.

IV. One of the Priviledges of *Minors*, is, that they cannot be subjected to Torture, lest the tenderness both of their Age and Judgement, make them fail, *ὁ ἡττω τῶν δεκατρίσων ἔτων, οὐκ ὑπάρχει ἐμβασανὸν ἐν τούτῳ*. *Eclog. de quest. cap. 9. ad, yet l. 15. ff. de quest.* Judges are discharged only to Torture such as are under fourteen; persons very old were not to be tortured, for the same Reason, *l. 3. ff. ad S. C. sillan.* Which was by some extended to Women, sick persons, and such as had been eminent in any Nation, for Learning, or other Arts, but all this is arbitrary with us.

V. These who Torture, if the person tortured die, are punishable as Murderers, but though they die not, yet by the Civil Law they were punished, *deportatione in insulam*, or by banishment; and with us they are punished according to the quality of the Crime.

## TITLE XXVIII.

### Of Remissions.

- 1 Whether he who uses a Remission acknowledges the Crime.
- 2 How Remissions are granted.
- 3 For what should no Remissions be granted.
- 4 Letters of Slaves, and Assishments, when necessary.
- 5 Persons condemned, are sometimes restored by way of justice.

When the Judge has pronounced his Sentence, he is *functus officio*, and the punishment irrogat by him, can only be remitted by the Prince, though the Council may moderat, or delay it.

The Party condemned is restored either by way of Grace, or of Justice: *Restitutio per modum gratia*, is with us called a Remission.

I. Remission then is the pardon of the Crime, graciously allowed by the Sovereign, and it may be given, either before, or after the Pannel is convicted.

If it be given before Conviction, the Pannel by making use of it, doth *per fictionem* acknowledge the guilt, and if he do not acknowledge the same, the Remission is null, and will not stop the Execution, as was found in *Alexander Kennedies* case, and this is as a received *Maximè* with us, yet *ex sententia Doctorum, non videtur fateri crimen, qui gratia utitur*. *Alexander. consil. 70. Bossius de remed. ex clem. num. 29. nec potest Judex dicere ei, qui vult ea uti oportet fateris delictum, alias non umeris*; yet *Bossius* tells us, that by

the Custom of *Milan*, he who uses a Remission, must acknowledge the Crime, *ibid.* but our Law in its forefaid Maxime may be reconciled with these Doctors, for even with us, the taking a Remission doth not prove the Crime, since that may be done sometime, rather upon the account of Security, than Guilt, & *licet se redimere à lite*; and therefore *Braids* Escheat, as an Adulterer, was not declared, *January* 1662. by the Lords of Session, there being no Probation of the Adultery, but the Adulterers taking a Remission; but the using a Remission doth certainly prove, as was formerly observed from these Statutes.

This Remission is granted by a signatur under His Majesties hand, and is presented in Exchequer, which is equivalent with us, to that *iteratio* mentioned by *Perez. ad tit. de sent. passis num. 16. Clarus. fin. quest. 59. Num. 10. quæ est approbatio senatus, quæ in causâ cognitione versatur ne impetrentur gratiæ per obreptionem, vel subreptionem*; and therefore if the Remission be granted upon a misrepresentation, the Council will upon a Bill stop the same, till His Majesties further pleasure be known, as they did in *Murray* of *Burghtouns* case: and though by the 13. *Act. 10. Par. 7. 6.* The writer of such signators, should subscribe his name upon the back of the signator, to the end, that he may be answerable, if it contain any thing that is unallowable; yet the said Remission granted to *Burghtoun*, was sustained, though it had not been so subscribed, when it past his Majesties hand, yet being alledged to be in desuetude but rather because the writer did thereafter subscribe. *Jan. 1666.* and these Remissions are ordained to pass the great Seal, of design that the Seal should be a check upon them, but if they passe the Seal, they cannot be recalled, *tantum surreptitia. Boff. ibid. num. 36.* for, sayes he, they are ordained to be presented, *in senatu, ne sint surreptitia, & ut inquiratur*: And therefore it is appointed by the fourth *J. 4. Par. 6. c. 62.* that the Remission should contain the greatest Crime for which the Remission is craved, and if the greatest Crime be not exprest, the general clause remitting all Crimes, will not defend against a pursuit for any Crime that is greater than the Crimes specified in the Remission suitable to which Lawyers asert, that *qui petit gratiam, debet non solum delictum exprimere, sed & qualitates ejus, aliter uti subreptitia, nihil valet, sed non debet exprimere omnia delicta separata. Boff. ibid. num. 33.*

III. Remissions should not be granted for Slaughter committed premeditately, or by Fore-thought-felony, *Stat. Dav. 2. cap. 50.* where it is ordained, that no Remission shall be granted for homicide, till inquisition be first made, whether the Slaughter was committed by fore-thought-felony, and if it was so committed, the Remission shall be null, & *hoc concessit rex*, as the Text sayes, This is confirmed by *K. Ja. 4. P. 6. c. 63.* which Act is declared to endure, till His Majesty recal the same, and yet it is repute a temporary Act, and notwithstanding thereof, remissions are ordinarily past for Murder, as in the Earl of *Caitness* remission 1668. Against which, this was objected; but repelled. Yet in *Flanders*, and other places, this Law is still in force.

No Remissions should be granted for burning of Corns in stacks, or barns *Act. 18. P. 7. J. 5.* Which Act is not temporary, and yet it is not observed as was found in the forefaid remission.

All Remissions should be componed, and subscribed by the Thesaurer, Registrar in his Books, *J. 6. P. 13. c. 169.* Albeit His Majesty may remit what injury is committed against him, yet he cannot prejudice thereby the interest of third Parties. This satisfaction is by the *Civilians* called *reparatio dampnorum*, by us an Asslithment, and the obtainer of the remission, must find caution to refund the party injured, of all his damage and interest, within forty days after he produces his Remission, else his Remission is null, *Act 75. P. 14. J. 2. Act. 136. P. 8. J. 6. & Act. 151. P. 12. J. 6.* but these Acts are only temporary



porary. But by the Act 174. P. 13. J. 6. Remissions granted to any persons passing to the horn, for Theft, Rief, Slaughter, Burning, or Heirship, are declared null; if the party lased, be not first satisfied: and albeit it would seem by this Act, that Assithment subsequent to the Remission, is not sufficient: yet the meaning of the Act is, that the Remission shall be of no avail, till the party lased be satisfied.

Notwithstanding of these Acts, it is *depractica*, very dangerous to challenge a Remission, and I am informed, that one of the learnedest Lawyers of his time, was sent to the Castle for quarrelling the Kings power, in granting a Remission for fire-raising; yet I find a Remission produced by *John Bell*, quarrelled as null, because 1. It was given for Murdering *Christopher Irving*, and so is null by the foresaid Act. 2. The Remission should contain the greatest Crime and Slaughter is not so great a Crime as murder, Nor was the quality of forethought-felony exprest. 3. It was not subscribed by the Thesaurer. The Justices delayed to give answer, but I find not the person was punished 1643. As also *Mackie* being convict for falsit, and having enacted himself never to return under pain of death; thereafter he returned, and being pursued for his life, alledged upon a Remission. To which it was answered, that the Remission was null; because he returned before it was obtained, and past the Seals, nor was it yet past. Upon which the dyet was continued, the 24. of Febr. 1622. But it is observable, that the pursuit was here at the Advocats instance only, who could not quarrel his Majesties Remission upon any account.

IV. If the party doth willingly grant a discharge of all grudge, or revenge in the Crime of Murder, this discharge is called a letter of Slanes, and is called by the Doctors, *litera pacis*, and thus, *Plot consil.* 78. sayes, that *gratia facta parti nocenti à principe non valet, nisi fiat reparatio damnorum, & interesse, vel nisi pax sit prius habita, ab hæredibus offensi.*

This rule hath some exceptions, both by the Common Law, and by ours, for by ours, exception is made of Remissions granted for pacifying the *Highlands*, and *Borders*, which are valid, though the party lased be not satisfied. Act. 174. P. 13. J. 6. Which is introduced in favours of the publick quiet, and is founded upon the same reason, from which Acts of indemnity are granted, without gratifying, or repairing these who were ruined by the persons indemnified. And for that reason also, *rex potest gratiari nocentem, sine pace privati interesse habenti, quando dammandus laborasset pro bono reipublica & fecisset illud, per quod multorum salus causata esset. l. non omnes. §. fin. ff. de re militari.* By thir Remissions, the party is not restored to his good fame, *l. 3. C. de gen. abolit indulgentia patres conscripti quoslibet liberat, notat, nec infamiam criminis tollit, sed pænam gratiam facit.* And though I think this should hold in such as are remitted, after they are condemned, because they are known to have diffamed themselves, by contracting that criminal guilt; yet it should not hold in such, as secure only their own innocence by a Remission, and redeem themselves rather from hazards, than from guilt.

V. The Kings Majesty sometimes restores the persons condemned, by way of Justice, *per modum justitiæ*, which he doth by rescinding the sentence, that stands against him as unjust; and this is done, either in Parliament, if the person was condemned by them, or by a review, in the Justice Court, if he was condemned there; and in this case the party is restored, not only to his Fame, but likewise to all his Estate, even though it was bestowed upo a Third party, as was after much debate, found by the Parliament, 1661. in the case betwixt the Marquess of *Montrose*, and the Marquess of *Argyle*.

## TITLE XXIX.

### Of Prescription in Crimes.

1 *How Crimes did prescribe by the Civil Law.*

2 *Whether do Crimes prescribe by our Law.*

According to the Civil Law, Crimes did prescribe in twenty years, *L. querela se de fals.* And *Clarius* doth assert, that generally all the Doctors are of opinion, that all criminal Pursuits prescribe in that time, but this Prescription did not run in some atrocious Crimes, such as Sodomy, Paricide, Apostacy, &c. Wherein they erre, for where the Law says, that either *semper paricidii accusatio permittitur*, as *l. ult. ff. de leg. Pompei, ad paricid.* or that *nullis temporibus arcetur apostatorum accusatio*, that must be interpret, *de prescriptione viginti annorum*, which is in Law, called *longissimum tempus*, but the Crimes of Adultery, and *peculatus*, prescribe in five years.

II. It may be doubted with us, if Prescription has place at all; and that it has not, may be urged from these Grounds. 1. That Prescription has no place with us, except where it is warranted by a particular Statute, and there is no Statute warranting Prescription in Criminals. And if Prescriptions founded upon the Civil Law, had been sufficient in Scotland, there needed not any particular Act to have been made in civil Cases; but since our Law thought necessary to make Laws as to Prescriptions in civil Cases, they had much more determined this Point, by Law in Criminal Cases, if they had thought it fit to extinguish Crimes by Prescription: But on the contrair, our Act of Prescription in Heretage, 1617. hath excepted the Crime of Falshood from Prescription. 2. There being *jus quæstum* to the King, by the committing of the Crime, both *quoad vindictam*, & *bona fisco applicanda*, that Right cannot be taken away from him, but by a publick Law, or his own privat Remission. 3. It seems unreasonable, that because a privat Party will not inform, being either affraid, or negligent that the publick should therefore suffer. 4. There is no instance in all our Practiques, where Prescription hath been sustained; but on the contrair, Crimes of an old date, even after fourty years, have been punished. 5. *Semel malus, semper presumitur esse malus in eodem genere malitia*; and therefore it is unjust, to suffer a person to live in the Common-Wealth, who will be both doing wrong himself, and inciting others to do so, by his Example. Yet for the other part, it may be urged. 1. That the only end of Punishment, is, that the Crime committed, may be punished, to preven the Errour of others; But so it is, that after a long time, both the Publick is presumed to have forgot, that any such Crime was committed, and the Parties injured, are presumed to have forgot, and remitted their privat Revenge, for satisfying whereof, punishments are inflicted. 2. After so long a time, any Probation that could be led, against the Malefactor, either fails, or the Witnesses after so long a time, may have forgot the exact Cir-

circumstances; and it were very hard upon testimonies, that have so unclear a *causa scientia*; as these witnesses can give, to take a way a mans life. Likewise, the Witnesses, and other probation will probably perish, whereby the Defender might have exculpat himself, and maintained his innocence, so that the Fisk, or any privat party, may by their negligence, or upon design, prejudge the Pannel of his defences, against the common rules of the Law, whereby mens negligence can only wrong themselves, and they have only themselves to blame, that did not make use sooner, of the remedy appointed by the Law, for satisfying either publick, or privat revenge. 3. Since our Law doth punish Perjury, and poiding of Oxen, Usury, *Stellionatus*, and others; according to the Civil Law, it seems to be most agreeable to reason, that as these Crimes are punished, according to the Civil Law, so they should be extinguished by the Civil Law, *nam nihil est tam naturale, quam unumquodq; eo modo dissolvi, quo colligatum est, & quem sequitur incommodum eum sequi debent commoda*: And the Act 16 17. did introduce prescription with us, as the Act it self bears, because it was allowed by the Civil Law, and the Laws of other Nations. 4. It were absurd, that in the case of Treason, which may be inquired into after the Defenders death, there should be no period of time, whereby Families might be secure; and that it should be lawful, after two or three hundred years, to vex Families of great honour, and Interest, upon pretext of Crimes committed by their Predecessors. 5. This prescription is very justly introduced, to punish the negligence of such, as will not pursue Crimes; and it is most presumeable, that if they pursue, after they have delayed for so long a time, that any pursuit thereafter intended, is rather intended upon some supervenient quarrel, and picque, than upon the account of the Crime. 6. The fear of punishment, and conscience of the guilt, for so long a time, is in it self a sufficient punishment; And so GOD Almighty himself thought in the case of *Cain*; and therefore to punish after so long a time, vvhether to punish tvvice. By our Lavv, recent Crimes are more severely punished than others, as Murder vvith red hand, and the Thief taken vvith the Fang, and by how much the Crime grovvs older, by so much it should be the les punished. 7. The necessity of Example, which is the Reason inductive of punishment, fails in old Crimes, so the punishment should then also be remitted, as unnecessary.

To the contrary Arguments, it may be answered, to the first, that our Criminal Law, being much more founded upon the Civil Law, than any other part of our Law is (as shall be clearly proved) there needed no particular Statute in this case with us, especially seing this prescription of twenty years in Crimes, has in effect become the Law of Nations, and several other Nations who have many Statutes in other cases, have yet allowed of this Prescription without any particular Statute. 2. There seems to be greater Reason, that an Act should have been necessary for prescription, *in civilibus*, than in Crimes, because in civil cases, the *Roman* Law was very various, and *quoad*, the particular periods of time was altered by all Nations, according to the particular state of their affairs; but in criminals, their prescription was exactly observed, by all Nations, and was very reasonable: and there being expressly, *jus quaesitum in civilibus*, to every privat person, it was necessary that should have been taken away by an expresse Statute; but it is not so in crimes where in effect, at first there was no expresse, *jus quaesitum*, either to the King, or any privat party, but only a *potestas acquirendi*; for the *jus quaesitum*, is only by the sentence, for before sentence, the Fisk could not dispoise upon, and so had no right to the Malefactors goods, and this answers likewise the second reason.

To the second, third, fourth, and fifth, it is answered, that doubtless, the wise *Romans*, and other Nations, could not but have these inconveniences



under consideration, when they introduced the foresaid prescription in Crimes; and to the third, it is particularly answered, that if privat parties will not pursue their revenge, they justly lose the capacity by their negligence, and His Majesty having so many sworn Officers, in every corner of the Land, it is not presumable, that any inconvenience will arise through want of information, but if there do, it is much more reasonable, that these negligent Judges should be punished, especially seeing there are express Laws, appointing negligent Officers, in such cases, to be punished. To the fourth, it is answered, that negative Arguments, brought from the not being of a Law, or a custome, is not concluding, for as in many other cases, so this might have been argued, as strongly as here against His Majesties Advocat, when he of old craved, that the Heirs of Traitors might be forefaulted, for their Predecessors guilt. And when he of late craved, that probation might be led against Traitors in absence; in either of which cases, there was neither Act nor Practique; nor could anything have been alledged, but the Authority of the Civil Law, and the consent of other Nations. To the fifth, the Crime being taken away by so long a time, it were unjust to take away a mans life, upon the former prescriptions; and the fear of punishment, is a sufficient punishment, for all the malice arising from that prescription: neither is it presumed, but that if a Malefactor continue to be ill; he will be pursued within twenty years; and if he did for twenty years live so soberly, and discreetly, as that the Law thought not fit to take notice of his former Crime, there is little hazard of any future malice.

And to this opinion I rather incline, because *Carpzov.* relates, that albeit by the Statutes of *Saxonia*, prescription is only introduced by expresse Statute, in moveables, and heritage, and that there is no expresse Statute, as to prescription in Criminals, yet these prescribe also in twenty years: because that prescription introduced by the Civil Law, is not expresse abrogat amongst them, *nam non presumendum est totam prescriptionum observationem tantis vigiliis excogitatam, Saxonia legistatorem evertere voluisse, ut in simili casu dicit Imperator. l. 34. C. de in offic. test. & Petr. Heig. part. 1. quest. 26. num. 47. vid. Carpzov. part. 3. quest. 141.*

# TITLE XXX.

## Of Punishments, *de Pœnis.*

- 1 *The Design of punishment.*
- 2 *Whether crucifying, or Banishment, be lawful punishments.*
- 3 *Whether a man can bind himself under the pain of death.*
- 4 *Whether arbitrary punishment can extend to Death.*
- 5 *The loss of Life is still followed by loss of Moveables.*
- 6 *How far can Ignorance, anger, Drunkenness, or Command, either excuse from punishments, or lessen them.*
- 7 *How far doth Nobility, or great Merit, excuse, or mitigate punishments.*
- 8 *How far doth the inconsiderableness of the Transgression mitigate, or lessen the Punishment.*

I. **P**UNISHMENTS are inflicted, not only to satisfy, either the publick Revenge of the Law, or the privat Revenge of the Party, but rather to deter others for the future; and yet they are rather inflicted upon either of these Designs, than to punish the Offender, and make him insensible, for what is done can no more be helped.

Some Crimes are so horrid, and so unknown to the World, that it is not fit the Malefactor should be punished publickly: Thus some Crimes have been tryed in Scotland, at Midnight, and the Malefactor immediatly drowned in the North loch, without inserting any part of the Process in the Journal-Books, wherein also I found, that Malefactors were ordained to be execute very early in the morning; for Bestiality, which was occasioned by the Confession of one, who asserted, that the reason of his committing that Crime, was a Curiosity he contracted at his seeing one executed for it. And in such Crimes no man needs to be deterred, nor will terror restrain him, whom Nature cannot. Since then Executions for some Crimes, incite some to Curiosity, and vex others with Horror, and are necessary to none, some may be more properly punished privatly, than publickly, and thus such persons as are popular, and are executed only for Crimes, for which the People have a Kindness, will be more happily executed privatly, than publickly, because the persons executed, are by publick Executions obliged to die rebelliously, and the People are confirmed in their good opinion of them, by their Courage at Death.

II. *Constantine did forbid, that any Malefactor should be crucified, and this he did, because of his respect to the Cross; he likewise did forbid, to stigmatize the Face, l. 17. C. de pœnis, because the Face is Gods Image.*

Martyrus was of opinion, that Banishment was not lawful, lest the person so punished, should be forced to live amongst Turks, and others, by whom he might become more flagitious, than formerly; and I have oft thought it inhumane, to send our Malefactors to our Neighbours, and imprudent, because it will occasion the sending of theirs from home, whereby we may be likewise troubled with such as they have banished: And it is probable, that Correction-houses

would be both safer, and more advantageous, for in these they may serve the publick, whom they have offended; But with us, no Judge can confine a Man, whom he banisheth to any place without his Jurisdiction, because he hath no Jurisdiction over other Countreys, and so cannot make any Acts, nor pronounce any Sentences relative to them.

Torturing punishments at death, are also very inexcusable, for they oft-times occasion Blasphemies in the dying Malefactor, and so damn both Soul & Body, whereas the Soul should be allowed to leave quietly in this Earth, and go in peace to the Region of Peace; nor doth these terrifie others from the like Offences, for these who fear not Death, will fear nothing.

III. It was a Rule amongst the *Civilians*, that no man could oblige himself to any thing under a corporal Pain, *quia nemo est dominus suorum membrorum*. But with us, it is most ordinary for a Man who is guilty of a Crime, to oblige himself never to return to *Scotland*, under the pain of Death; thus *Hamilton* was hang'd, *Anno 1649.* for returning to *Scotland* after she had enacted her self, never to return under pain of death, and her Dittay was only founded upon that Contravention; and certainly, Contempt being added to the former guilt, may make a Crime that was not capital, become so; and this Contravention implyes in effect, *panam effracti carceris*, which is oft-times Capital; so that though a person cannot bind himself, when he is guilty of no Crime, to perform any thing under pain of Life, or Limb; yet if he be guilty of a Crime, he may consent, and enact himself, as said is.

IV. Whether when Law allows a Judge an arbitrary Power in punishing, that Judge may inflict death, in that case is much contraverted: *Chassan* and *Socin.* think that he cannot, and this seems clear, 1. 4. *qui vexant annonam debent puniri extraordinem non tamen anima amissione Inst. de publ. ind.* And *Papon* relates, a Decision of the Parliament of *Paris*, finding that it could not. 2. This would make Judges very arbitrary, and render the Lives, and Fortunes of the *Leidges* very unsecure. 3. Seing Lawyers are of opinion, that no mans Life can be taken away without an expresse Law, it seems very consequential to this, that no Mans life can be taken away upon so general a Law. 4. By the 20. *Act Parl. 1. Sess. 1. Ch. 2.* death, and arbitrary punishment are opposed: For those who having past sixteen years of age, Beat, or Curse Parents, are ordained to die, but if they be within sixteen, and past Pupilarity, they are ordained to be arbitrarily punished. Whereas, if arbitrary punishment might be extended to death, this Difference would be ineffectual, and the Law thereby evacuat. And by the 5. *Act. 1. Parl. Ja. 6.* the punishment of Saying and Hearing *Masse*, is escheating of their Goods, and an arbitrary punishment of their persons, for the first Fault, Banishment for the second, and Death for the Third; so that Arbitrary Punishment is lookt upon, as less than death, else the first Fault should be as severely punished as the Third, against both the Principles of Reason, and the Design of the Law-giver. 5. Arbitrary punishment is appointed ordinarily for so mean, and inconsiderable Faults, that it were inhumane to think, that these could be extended to death: *Skeen* also. *de verb. sig. verb. iter.* sayes, that if the Pannel come in will, it is lawful for the Justice to fine him, according to his Offence, but he speaks not there of his Power to inflict Death, *eo casu*; and yet *Skeen ad cap. 6. l. Malcolumbi. vers. 2.* Wherein it is Statute, that the Marischal, and Constable of *Scotland* shall punish Offenders, according to the Quality of the Offence, observes, that *pana extraordinaria* may be sometimes extended to death; because of the aggravating Circumstances, and cites for this, *l. ult. ff. de priv. delict. & 16. de panis*, but these Laws are ill cited, as will appear by reading them. When the pain is by Law, or Custom



from arbitrary, and the Defender comes in will, he must presently find Caution to satisfy the Kings Will, betwixt and such a day, this is the constant Custom, and was practized the 27. of November 1600. *Advocatus contra Patrick M. erief*, and others, but where the Crime is punishable by an expresse, and determinat punishment, there, though a Defender come in will, it ought not to be received, and thus the Marquis of Argile being pursued before the Parliament for Treason, offered to come in will, but his Submission was not accepted.

V. It is uncontraverted with us, if when any Crime is punishable by death, the Moveables falls to the King, though the Act bear not, that the Crime shall be punishable by death, and Confiscation of Moveables; and according to the Civil Law, *proscriptus erat is cujus bona expressim confiscabantur, damnatus vero cujus bona tacite, publicatio enim bonorum sequebatur tacite penam capitale*, Matheus. cap. 2. de Sicariis, num. 2. And albeit the Judge should omit in his Sentence, the punishment due by Law; yet *ipso jure*, there is by the Damnation, *jus quasi sum fisco*, as was found after a large Debate, in the case of *Wauoh*, who being a Landed-man, found guilty of Thift, though he was only fined by the Sheriff in a thousand Pounds; yet the Donator to the Escheat was found to have right to all the Estate, and that without any new Sentence, which is conform to *l. 1. & 2. ff. de bon. damnat. & l. C. de bon. proscript.* But it seems hard, that Confiscation of Moveables, should still follow upon all Crimes, though the Law expresse not that way of punishment, seing this is to punish the Children, and not the Committers only, and since this having been only invented by *Julius Caesar*, as *Suet.* observes, *Justinian* did hereafter by his *Novel. 117. cap. 5.* appoint that the Offenders Goods should only be confiscated in Treason, for that Crime taints the Blood; nor have we any Law with us, appointing Confiscation in all Capital Cases. *Liv.* tells us, that this seem'd barbarous in the *Roman decemviri. lib. 3.* and *Herodot* assures us, that even the *Persians* would not confiscat the Offenders Estate, in the Crime of Treason, *lib. 3.* Nor would the Emperor *Arrelian* allow it, lest it should be thought, that he pursued rich Malefactors, meerly for their Estates, and really some Judges are to be jealous'd upon that Account. But though mens Escheat should not fall without expresse Law, yet Custom hath supplied Law with us in this.

Since a person who is interdicted cannot dispone upon his Moveables, the Question is, if they can fall under his Escheat, or if he can prejudge himself by his Confession, for *tantum facit quis delinquendo quantum facere potest contrahendo*; And therefore since he cannot alienat them by contracting, so neither should he be able to alienat them by Delinquency, especially if the Interdiction be judicial, by the Authority of a Judge, and founded upon the persons being prodigious, or of a weak Judgement: The like may also be doubted, in the case of one who is Proprietor of Lands by a Tailzie, bearing a Clause, *de non alienando, irritanter, & resolutive concepta*, who may evacuate the Tailzie, if it may be forfeited upon his Delinquency; As to the first of which cases, Lawyers are of opinion, that since Prodighals are esteemed as Pupils, that therefore their Goods cannot be confiscated upon any Confession emitted by them, without the consent of these to whom they are interdicted. *Cabol. Cas. 48. Bald. ad l. 1. C. de confess.* But they think that if the Crime be proved against them, then their Goods may be confiscated, for this privilege of Interdiction being introduced in their favours, ought not to be advantageous to them, in defending them against Guilt. *Castrens. ad l. etiam ff. Solus matr.* And with us, since Interdiction cannot defend against Captions, much less ought it to defend against Crimes. As to the second Question, it is clear, that such Tailzies, however conceived, cannot defend against Forefeiture,

for it is not in any Subjects power to secure his own Estate against Crimes; and if this could hold, then no mans Estate should ever forfeit, for all men would adject such Conditions, and this would invite them to commit Crimes, whereas the Law endeavours by all means to deter them.

Because many of our Laws appoint Crimes to be punished, according to the prescript of the Civil, and Common Law, as Falshood, Perjury, &c. And that many punishments there used, are now in desuetude: therefore it is fit to know, that in place of *damnatio ad bestias*, succeeds heading, or decollation; in place of *damnatio ad metallum*, succeeded the Gallies in France, and the Correction-house with us; *Deportatio* with them, is banishment with us; and *regulatio* with them, is confinement with us.

When two Laws inflict different punishments, upon the same Crime, how far the one innovats the other, I have debated fully, *Tit. De forcement.*

*Pena sunt temperanda* (punishments are moderated) in the opinion of Lawyers in these cases.

VI. Ignorance; which excuses none, if it be of the Law of Nature, but ignorance of the meer positive Law, excuses in some cases, Women, Peasants, or Bours, *rustici quando agitur de dolo presunto, secus vero ubi agitur de dolo, vero, nec excusantur ubi clam deliquerunt.* Ignorance also, in matter of fact, excuses persons, though judicious, if they followed the faith of such as understood, *sicrediderunt viro fide digno*, as Counsellors, Lawyers, &c.

2. Just anger, and grief lessens the punishment, *sive proveniat ex facto adversarii, sive tertii licet hoc non sit sine scrupulo. Farin. quest. 91.* But I think that it should only lessen the punishment in arbitrary cases, but not in statutory punishments.

3. Youth and great age, sometimes excuse, but of these formerly, *Part. 1. Tit. 1.*

4. A man who is drunk, if he used not to be so, is somewhat excused, and is not punished for having committed the Crime (seing it is presumed, he understood not what he was doing, because he was drunk) but if the defender fell drunk upon design, or gloried in having committed the Crime, he is not thereby excused. Love also excuses in what is done, *ex subitio & improvise amoris impetu, secus si prameditate*, but even in the first case it only mitigats the punishment.

5. The custome of the place excuses, or at least lessens the punishment, when the Crime is not committed against the Law of God, or Nature, for Laws *ab eundo in desuetum linem sunt non leges, & non est in mala fide, qui facit, quod omnes faciunt.* But this was repelled in the Marquils of Argles case; who alledged, that he complied only with the usurpers, in the same manner that all the Nation complied, and yet the Council ordinarily admit this, to defend Highlanders, when they are cited for travelling with Guns, and other Arms, because it is the custome of their Countrey. And I think this may be alledged, to defend such as are accused for Witch-craft, in consulting such as can tell where they may find what they lost, or was stolen from them, but not from all punishments.

6. The command of a Superior or such as a master excuses his servant, as has been said in the Title of Theft, and of a Magistrat excuses Burgesses in Insurrections, hath been observed in the Title Sedition, and Messengers in executing Decrees, as hath been observed in the Title *De forcement*, a Son also is to be excused if he obey his Father, & in atrocioribus a pena ordinaria & omnino in laboribus, as is observed in the Title Art and Part.

VII. 7. Noblemen should get some allowance during the dependance of the process, and are never to be sent to correction houses, Pillories, &c. and as in no

no Crime they were punished by the Civil Law, till the Prince was first consulted (which we observe not) so if they commit a delict, or lesser crime, in necessary defence of their honour they are to be excused *à pena ordinaria*, and generally, the Doctors think, that they should only be punished, except when by their Crime, they have Forefaulted the Title of Nobility, as in betraying the Countrey, in stealing &c. For in these cases, they are to be more severely punished than others.

8. Great Merit and Skillfulness, excuses some Crimes, and good success is also an ordinary defence, as if a Souldier who disobeyed order, should beat the Enemy by that disobedience.

9. These who are pursued at the Kings instance, for Crimes committed in another Country are to be more gently punished, Because the scandal was not given there, and so the Offence was lesse in that Countrey, and some Lawyers are of opinion, that the Punishment should be still lesse where the private party injured insists not, *Cod. f. b. tit. de penis def. 22.* and because the scandal growsold, therefore after long silence, the punishment is to be moderated, *αὐτοματὸς ἢ τοὺς ἀναγὰς. l. 25. ff. b. t.*

For where the Law states a definit punishment, the Justice can neither augment, nor lessen it, else to what purpose should the Law specify punishments in some Statutes, and allow the Justices an arbitrariness in others. *l. 244. ff. verb. sig. multa potestas Judicis est quantum dicat sed hoc ita verum, si non lege sit constitutum, quantum dicat,* and since men are punished because they transgress the Law, therefore they should only be punished according to the Law, and the due observance of this, will keep Judges from being arbitrary, and the Liedges from being oppressed.

VIII. Whether the meanness of the transgression, should defend against punishment, or should only mitigate the punishment, seems to be dubious; because of the undigested discourses, of such as treat that Subject; yet I think they may be solidly reduced to these three conclusions, 1. That where there appears to have been *dole*, or contrivance in the committer, there the smallness of the transgression, doth only lessen the punishment, or if it be arbitrary by the Law, as for instance, if a man should paction for six shilling, and two pence *per cent.* where the Law allows only five shilling *per cent.* though the sum lent were very inconsiderable, and the excess be there very small, yet it should infer Usury; because a clear design of offending the Law, did there appear by but expresse paction; and in such cases our Judges find the Libel relevant, but reserve to themselves the consideration of the smallness of the excess, when they shall come to tax the punishment. 2. If the punishment be severe, and that it can not be remitted by the Judge, As if the Law appoint Theft to be punishable by death, it were unjust that an Inditement of Theft, should be relevant for stealing two pence. 3. If it appear by the meanness that there was no design of transgression, and that the committer designed not for so small a matter to commit a crime, in that case the meanness of the transgression ought to defend against the relevancy; For as Lawyers have well observed, *minimum non attenditur in delictis dolosis, Cravet. consil. 46, nec presumitur Cardinalem Simoniam commississe pro re minima, si questio sit de Simonia.* And to these cases only doth that Law extend, *de minimis non curat prætor. l. scio ff. de integrum restit.* And therefore if a person should be indited for committing Usury in so far as he took Annualrent before the terme, if the excess were small, because the Annualrent was very inconsiderable, and was taken but a Moneth or so before the term of payment, the Libel should not be sustained against him; for it is not presumable, that he took that Annualrent out of avarice, but negligently, looking upon it as no breach of the Law: or upon



on some other innocent Accompt, as because the Debtor and he were to fit other accompts, or the Debtor was to go out of the Countrey, and thus the Council decided in the case of *Purves Anno 1666*.

Where the punishment is arbitrary of its own nature, the Council may moderate the punishment determined by the Justices. 2. Where the punishment is Statutory, and determined by a special Law, as in Treason, &c. it may be argued, that there the Council can no more mitigate, than they can remit. 3. Though Custom be equivalent to Statute in other cases, yet in cases where the punishment depends upon custom, as Theft, I have often seen the Council alter the punishment from Death to Banishment: But it were sorer, that even in this last, the Mitigation were procured betwixt the reading of the Verdict, and the pronouncing of Doom; for after Doom, *jus est quæsitum Regi*. as to all the Movables, and Life.

## TITLE XXXI.

### Of Criminal Sentences, and their Executions.

- 1 *The form of a criminal Sentence with us, and how it is pronounced.*
- 2 *The Debate is not insert in the Sentence.*
- 3 *Whether the Sentence be null, in totum, if the Judge punish in less, than the Law allows.*
- 4 *Whether criminal Sentences may be pronounced in the night time.*
- 5 *Whether the Verdict of an Assize, be necessary in all cases with us.*
- 6 *Within what time should a criminal Sentence be put to Execution.*
- 7 *Whether Magistrats may force men to be Executioners.*
- 8 *How Absents are to be proceeded against, and when Letters of Intercommuning, and Commissions of Fire and Sword are granted.*
- 9 *Whether doth all punishments cease, by the death of the Party.*
- 10 *If a Criminal Judge may retract his own Sentence.*

• **A**fter Probation is led the Assize is inclosed, who return their opinion, which may be called their Sentence, and this Sentence is called a Verdict, or *verdictum*, *nam sententia pro veritate habetur*, but that which is properly the Sentence in a Criminal Cause, is that deliverance of the Judge, whereby the Pannel is condemned, and punished, or absolved from all punishment: and this Sentence is in Criminals, by our Stile, called an Act of Conviction, or an Act of Absolviture: But *acta*, in the stile of Lawyers, express only the middle Acts of the Process, *acta judicilia*, but not the Sentence. Sometimes likewise the criminal Sentence is in our Law called a Doom, especially in Forefeiture; yet to speak strictly, these two differ, for that part of the Sentence, which finds the Pannel guilty, or innocent, is called the Act of Con-

Conviction, or Absolviture; but that part of it, which irrogats the punishment is called the Doom, and these two are sometimes separate, which falls out when a long time intervencs, betwixt the finding of a person guilty, & the pronouncing of his punishment; but ordinarily they are conjoynd. All which will appear more clearly, by the severall forms hereexpressed.

## An Act of Conviction, and Doom, *Curia, &c.*

**T**He which day being entered upon Pannel, dilated, accused, and pursued, by vertue of Our Sovereign Lords Letters, raised at the instance of A. and B. Advocatto Our Sovereign Lord, for His Highness Interest, who compared personally, to pursue them for the Crimes following; that is to say, for so much, as by divers Acts of Parliament as in the said Dittay at more length is contained, after reading of the whilk Dittay, and divers Allegiances propounded by the Pannel, and their Procurators, and Writes produced for instructing thereof, that the said matter should not pass to the knowledge of an Assize, and Answers made thereto, be Our Sovereign Lords Advocat, and writes produced be him, for veresying thereof. The Justices fand the Dittay relevant, and did put the same to the knowledge of an Assize, of persons following, they are to say, whilks perjons of Assize being chosen, Sworn, and admitted, and the said being accused of the Dittay of the Crimes above-written, which were veresied by their own Depositions, and confession in Judgement, they removed altogether forth of Court to the Assize-house, where they be plurality of Votes, elected, and choosed the said C. reasoned, and voted upon the Points of the said Dittay, and being ripely, and at length advised therewith, together with the Depositions, and other Writes produced be his Majesties Advocat, for the veresification thereof, entered again in Court, where they all with one Vote, be the Report of the said Chancellour, Fand, Pronounced, and Declared the said D. to be filed, culpable, and convict of the Crimes respectivè, above-written, contained in their said Dittay, for the whilks cause, the Justice by the mouth of Demyster of Court, decern'd, ordain'd and adjudged the said to be taken to the Castle-hill of Edinburgh, or Mercat-Cross, and there to be hanged till he be dead, and his hail moveable Goods to be escheat to His Majesties use, or their Heads to be stricken from their Bodies, and the said to be taken to the Mercat-cross of Edinburgh, and there his Tongue to be pierced with an hot Boikin, and thereafter banisht this Realm, not to be found thereintill under the pain of death: Or to be scourged, & all their moveable Goods to be escheat, which was pronounced for Doom, Extracted.

## Act of Conviction.

**T**He whilk day entered upon Pannel, dilated, accused, and pursued be be vertue of Crimes purchast be him, against them, of Art and Part, of demembring of the middle finger of his left Hand, nearest his little finger, committed the day of upon the Street of which was put to the knowledge of an Assize, of the persons following, they are to say whilks perjons of Assize, being chosen and sworn, and admitted, after accusation of the A. of the Crimes aforesaid, removed altogether furth of Court, to the Assize-house, where they be plurality of Votes, elected and choosed the said in Chancellor, reasoned

soned, and voted upon the points of the said Dittay, above-specified, and being advised, re-entered again in Court, where they all in voice, by the mouth of the said Chancellor, fand, pronounced, and declared the said to be filed, culpable, and convict of Art and Part of demembring the said of his middle finger, nearest his little finger, of his left hand, committed the time foresaid, whereupon the said asked Instruments, Extracted, &c.

## Doom for Demembring.

**T**He whilk day, &c. being entered on Pannel, to hear Doom pronounced against them, as they that were convict be n Affize, in a Court of Justiciar holden within the Tolbooth of Edinburgh, the day of instant, for Art and Part of the Demembration of ut supra, the Justices by mouth of Dempster, Decerned, and ordained the said to content and pay to the Sum of three hundred Merks, in full satisfaction, and Assybmēt, of the Demembration of him of the said Finger, and to find Caution for payment of the said Sum, to the said upon condition that the said should deliver to the said sufficient Letters of Slaynes, for demembring him of his little Finger, who fand with themselves, conjunctly and severally, Soverty, and Cautioner fore-payd of the said three hundred Merks, to the said in full satisfaction, and Assybmēt, of demembring him, of his middle-finger, he grant and, and giving a sufficient Letter of Slaynes, as said is, and als decerned all the saids their Moveable Goods and Gear to be escheat, and in-brought to Our Sovereign Lords use, as being convict of the said Crime, whilk was pronounced for Doom, and Ordains Letters of Horning, upon a simple Charge of ten days, and Poynding to be direct hereupon.

Dempster our Countrey-man, *hist. eccles. pag. 235.* relates this solemnity, which is now in desuetude, *Lapidem tollit Magistratus signatumq; querenti tradit, ille adversarium & testes citat, si quid ambiguum, & majoris momenti, ad 12. (quo: claves appellant) refertur, atq; ita sine scriptis aut impensis lites dirimi sunt solita.*

II. By the former Stiles it will appear, that the Debate is not insert in the Criminal Sentence, as it is in civil Proces, with us, but it contains oft-times the whole Summons, which Decrets for Civil Causes do not. These Criminal Sentences likewise, express still the manner of the Probation, which is the Because of the Decreet, as we speak in civil Cases, & this the Doctors confess to be the Custom in other Kingdoms, *Inferitur enim causa in sententia, ut quod talis accusatus est de tali maleficio, & quod constat per testes vel per ejus confessionem, quod illud maleficio commisit & ideo condemnatus est, &c. Clar. 93. num. 21.* After the Sentence is pronounced by the Judge, it is written by the Clerk, who reads to the Dempster, the manner of punishment, and it is by him repeated, and the manner of Punishment is called the Doom, because it is pronounced by the Dempster, who adds after he has pronounced the punishment, and this I give for Doom. And I find, that by the Custom of Italy, the Clerk reads the Sentence, and the Judge adds, *ita absolvo, vel ita condemno. Clar. Ibid.*

III. Albeit the Sentence bear a punishment, less than what the Statute irrogates, *eo casu*, the Sentence is not by our Law null, but the Fisk hath, by vertue of the Conviction, contain'd in the Sentence, Right to put in Execution,



on, or to exact what the Law appoints, though the Sentence doth not. And thus *John Wauch* in *Selkirk*, being found guilty of Theft, by the Sheriff of that Shire, he was ordained to pay two thousand Merks, or to go to *Barbadoes*, in obedience to which Decreet, he payed the two thousand Merks. Notwithstanding whereof, the Exchequer gifted his Liferent-elcheat to Mr. *Andrew Hedderweik*, who pursued a Declarator; in which the Lords found, that *Wauch* being once found guilty of Theft, there was *jus quæstum Regi*, which the Sheriff could not prejudice, by any Sentence, no more than he could remit the punishment altogether, for in far as he did mitigate the punishment, in so far he remitted it. To which it was answered, that Theft was arbitrarily punished by our Custom, sometimes by death, sometimes by Fyning, according to the several Degrees of the guilt, which was punishable; and Custom had in this prorogated the power of inferior Judges. 2. If the Sheriff had done Wrong, he was liable, *ex officio*, and might be punished for exceeding his power, but the Party was free by his Sentence; and if the Sheriff had absolved him, though unjustly, he could not have been pursued again; so much more should the Sentence of the Sheriff, absolve from a greater punishment, than that which the Law appoints; *nam qui potest majus potest & minus*.

IV. Some Lawyers declare all Criminal Sentences, pronounced in the Night time, to be null, but others declare, that Custom hath allowed them; and though some allow inferior Judges to proceed in the Night-time; but not Supream Judges, *Alber. ad l. non minorem. C. de transact.* And some allow delegat Judges to pronounce their Sentences in the Night, but not ordinary Judges; because the Dyets of an ordinary Judge are fixt, by the Custom of his Predecessors: whereas a delegat Judge, is tyed to no time, nor place, except he be tyed to it by his Commission, *Cassren. ad D. l. minorem. num. 4.* Yet I would rather choose to define, that albeit regularly, a Judge ought to proceed in open day, to sentence Criminals, yet he may pronounce Sentences lawfully in the Night-time, in these cases. 1. If the case require hast, as in Mutinies, and Conspiracies falls out. 2. If the Crime be so abominable, that the Prince, or Judge is unwilling that the People should know that there was such a Crime committed, as was done twice by the Justices, in the Reign of King *James* the 6. by his own special Recommendation, and then all the Process, Sentences, and Executions, was at Midnight. 3. If there be just ground to suspect, that Force will be used, for rescuing the Pannel. 4. Some add, that if the Judge be so busy, that he cannot proceed in the day-time, he may proceed in the Night-time; but this seems hard, *vid. Cab. ref. crimin. cas. 218.*

V. Though a formal Tryal, by a Process, and Affize, be the regular Form of Tryals, yet in cases of lesser Consequences, the Justices, and other Criminal Judges, punish Malefactors, in lesser Crimes, *sine strepitu, & forma judicii* summarily, by ordaining them to be Scourged, or Banisht; instances whereof, are given in the Titles of Murder, and Witch-craft; and the Justices allowed this Custom in the procedure of the Magistrats of *Edinburgh*, which as it is conform to Reason, so is Warranted, *per. l. 2. §. 51. publico. ff. de adulter. l. 2. C. de abol. l. levius ff. de accusat. tu ostendimus quia non est contra consuetudinem*. And though *Durie* observes, that the Lords found, that Sheriffs, and other inferior Judges, could not fine in Bloodwits, for above ten pounds, without an Inquest; yet now Sheriffs fine, and Imprison for all Bloodwits, and lesser Delicts upon Probation, led before themselves without an Inquest.

VI. Within what time a Criminal Sentence should be put to Execution is not generally determined; and the learned *Matheus* has shewed much reading in this point, yet I might begg leave to use some liberty, being now so near the end of this Treatise; to shew what may be added, to his learned Observations, from which I have hitherto abstained, because my design was rather to inform others, than to raise in them any esteem for me. By *l. 5. C. de custod. reor.* It is ordained, that *convictos velox pena subducatur*; But *l. 20. C. de penis*, it is said, *nolumus statim eos aut subire penam aut excipere sententiam, sed per triginta dies super statu eorum, sors & fortuna suspensa sit*. In reconciling which Laws, *Cujac.* thinks, that generally the punishment should be presently inflicted, and that thirty dayes are only to be allowed where the Prince himself has imposed a severe sentence, which seems to be allowed by that learned Greek *Scoliaſt Thalalaus*, *ſi princeps ſtatuerit penam in aliquem non ſtatim punitur, ſed dierum triginta dilatio datur, forte enim princeps interim penam revocabit*, οὐκ ἔστι γὰρ τοῦ βασιλέως ἐν τούτῳ τῷ χρόνῳ τῆς τιμωρίας ἀνακαταστροφῆς.

And though *l. 19. Basil. de custod. reor.* & *cum fuerit convictus, non statim penam pendere; ſed rursus conjici in custodiam, iterumque eductum audiri, nam hæc dilatio iram judicis moderatiorem reddit*. Yet by the word *Convictus*, there is not meant, the last Sentence, but the being so convict, that he may be put in Irons, which was not allowed, till the prisoner be thought guilty, was by the Judge, as *Thalalaus* excellently observes, *ἡ δὲ αὖτις ἀφαιρῶνται αὐτοῦ αἱ ἀλυσίδες καὶ τοῦτος ἀφαιρῶνται*. It may be likewise observed, that the former, *l. 5.* doth not ordain that the Sentence shall be presently put to Execution, but that prisoners shall be presently tryed, for the words are, *de his quos tenet carcer incluser, ſancimus ut aut convictos velox pena subducatur, aut liberandos custodia diuturna non mactet*; And therefore that Law proceeds, to ordain the names of the Delinquents, to be given up to the Judge, within thirty days. And the *Basilicks* translate this Law thus, *ne diu is qui comprehensus est, maneat in custodia oportet enim eum cito absolvi, vel puniri*.

The reason of allowing thir thirty dayes, was, because *Theodosius* having executed many Inhabitants of *Theſſalonica*, whilst he was in passion, and raising of a slight tumult, he was so sensible of this frailty, that at *St. Ambrose's* desire he did endeavour to bridle that rage, in succeeding princes, which he did then so abominat in himself, *Enſeb. Eccles. hiſt. lib. 11. cap. 18.* And yet I find, that this same Law indulging thirty dayes, has been much older, as appears by *Quintillian declamazione de falso cedis damnato*, the words are, *& mihi videtur ideo constituta esse lex, qua damnatum post tricesimum diem puniri voluit, quia modo videbat legumlator posse fieri; ut deciperetur accusator, modo ut calumniaretur*. And though it may be urged, that a present Execution is convenient, because that prevents the prisoners escape, by tumult, or killing himself; and that the more speedy the Execution be, the Justice is the more remarkable and can be the less interrupted by appeals, and intercessions; Yet certainly a Christian Magistrat, should allow some time to the Malefactor, for setting his Soul, and House in order; least he else by his precipitancy, destroy the Soul, with the Body, and punish the innocent posterity, with the guilty Pannel, who gets not this time to settle his affairs: and it hath been oft found, that persons thus too hastily execute have been thereafter found innocent; great examples whereof, are set down by *Valer. Max. lib. 9. de temeritate*: And *Seneca de jura lib. 1.* It is likewise the interest of the Prince, that he may have time to interpose; and for this cause *Tiberius* being offended, at the Senate too speedy executing *Caius Lutorius*, ordered, that no man shall be execute within ten days after the Sentence, *Dion. in Tiber lib. 57. vid. Sidon Epist. 7. lib. 1.* By this delay likewise, the persons convict, have oft-times been induced to discover their

Com-

Complices, and to confess the Crimes, which others have denyed in a rage, or confusion, occasioned by the shortnesse of their respite.

With us, a sentence may be presently put to Execution; and the Judge is confined by nothing, but by his own discretion; yet where pecuniary Mulcts are inflicted, either the Pannel is returned to Prison, till he pay his fine, or the Act of *Adjournal* bears ordinarily, that payment should be made within six dayes, and though Barons cannot poynd in Civil cases, upon lesse than fifteen dayes; yet it was found that they might presently poynd, *sine ullis indiciiis legalibus*, upon Criminal Sentences.

VII. Sentences were execute of old, amongst the *Romans*, either by the Common Executioner, or by Souldiers, *l. 7. C. de Cohort.* an instance where of is clearly to be seen in our Saviours Passion; and these Souldiers were called, *optiones & speculatores*, *l. 6. ff. de bon. damnat.* And yet I rather think, that the Souldiers were only Guards, and never Executioners, and were called *Speculatores*, because they were appointed to oversee the Execution, and to restrain Tumults. Especially seeing common Executioners were so infamous, that they could not be advanced ever thereafter to any sacred orders, *C. clericum distinct.* 50. And I remember to have seen the Executioner of *St. Johnstown*, repelled by the Lords of Session, from being a Witnesse.

That the Justice may force any of the Magistrats of a Town, to supplie the place of an Executioner, if they want one, is I think, without all warrant; seeing *officium nemini debet esse damnosum*: And no man would be a Magistrate, if that were allowed; but I think that the Magistrats may be fined for negligence, if they omit to appoint one; and for the same reason, I think that the Magistrate cannot force any mean person, who leads an honest life, to be an Executioner: albeit *Clar. §. Fin. quest. 99. num. 4.* And *Games. lib. 3. cap. ult. num. 5.* do asseert, that the Judge may force any, *ex infima plebe*, to officiate in that employment; and yet their opinion agrees with our custome. The Executioner hath right to the Cloathes (*pannicularia*) of the person executed, by our custome. And *per. l. D. Hadrianus ff. de pon. dam.* But by the Civil Law, the bodies of the persons executed, could not of old be buried without the permission of the Prince, *ff. de Cadav. punitur.* which is antiquated, *per l. obnoxius C. de relig. & sumpt. fun.* And by our custome, wherein the persons execute, may be buried, in all cases, though the friends of the person condemned for Treason cannot assist on the Scaffold, or wear mourning, by our customes, except the Council give expresse consent.

VIII. If the Defender be absent, then upon an Act of *Adjournal*, he is to be denounced Rebel, or outlawed, (as the *English*, and our old Statutes call it) and though if the punishment be capital, or the fine be for His Majesties use; the Clerk of the Justice Court, can only write the Letters; yet if the fine be to be payed to any privat person, any Writer to the Signet may write the Letters; and though the 126. *Act. 1. Pa. Ja. 6.* appoints that all Criminal Letters should not be registrat, as other Letters, but returned to the *Adjournal*; yet *de praxi*, such Hornings are some times registrat, in the ordinary Register of Horning; likeas, albeit the Escheat of him who is denounced, cannot fall upon a denunciation, at the Mercat Crosse of *Edinburgh*, though Caption may be raised upon such an Execution, yet Criminal Letters may be execute at *Edinburgh*, or any Mercat Crosse where the Justice Court did sit, in which the Sentence was pronounced, *Act 140. Parl. 8. K. J. 6.* upon production of the Registrat Horning, Letters of intercommuning are granted, upon a common Bill, past by the Lords of Session, by which all the Leidges are discharged to intercommune with the Rebel, which must be execute at the Mercat Crosse of the respective Shires, and Registrate there, or in the general Register.



Upon the denunciation immediatly the single Escheat falls, and after remaining at the Horn for yeae and day, the Liferent Escheat falls; which custome we have borrowed from *Saxonie* (with most of our other forms) for with them, *si reus fugitivus in primam sive simplex bannum sit declaratus nec intra annum & diem se purgaverit sed annum & diem prorogare passus sit, in bannum superius incidit vid. Carpt. pract. crim. part. 3. quest. 140. num. 80.* From whom also we have our stile of declaring Escheats.

Upon the registrat Horning Caption is raised, and if the Messenger be deforced in the Execution thereof; then the Council grants commission of fire and Sword, which is but a Caption for inbringing the Malefactor, who resists the ordinary course of Law. And in my opinion, Letters of Fire and Sword may be granted, though the Malefactor hath not deforced, if it be notour that the Malefactor be not to reduced in the ordinary way: For it is unreasonable to expose His Majesties Law to contempt, and His Officers to certain hazard, as in the case where a person is denounced fugitive for deforcing Messengers, or hath convocat loose men, and lives in open rapine: it were against sense that a new deforcement was necessar. But thir commissions are never granted but in Criminal cases; and yet I remember, that one was granted to *Mackintosh*, against *Lochiel*, after that *Mackintosh* had obtained Decrees of removing, and had raised Letters of ejection, but the Sheriff had declared that he durst not eject, for the Council thought it not just to expose the Sheriff to certain hazard. And yet the ordinar course is, that the Sheriff should offer to eject, and if he be deforced, then the case becomes Criminal; and some think that the execution of Deforcement is not sufficient in that case, without a sentence ensuing on it, and that the Deforcers be registrat at the Horn thereupon. But others think, that as in Civil cases, Letters of second Caption are granted, where the first Caption cannot take effect; so in cases of extraordinary opposition to authority, Letters of Fire and Sword are granted, upon a meer execution, that the ordinar course of Law cannot take effect.

IX. It may be doubted what a Judge ought to do, if after Sentence, the Innocence of the person condemned, should be convincingly cleared; in which case, the Answer is, that the Judge cannot rescind his own Sentence, *την τιμωριαν ου εχει τον αρ χοντι ανακαλισται*; l. 56, *Basil. de pen.* but he ought to acquaint the Council, that they may interceed for his Remission, l. 27. *de pen. l. 1. §. ult. ff. de quest.* the Council may prorogat also the Dyets appointed for Execution; but I think the Justices, and much less inferior Judges can not prorogat Dyets appointed for Execution, even by themselves, since they are *functi*, by the pronouncing of the Doom, though some ignorant Judges, *de Facto*, prorogat Executions, and as they cannot even before Sentence remit, so neither can they prorogat for any long time, for else Prorogations may be lengthned, so as to become Remissions upon the matter. The other side of the Doubt, *viz.* Whether a person once absolved, may be thereafter pursued for the same Crime, is more intricat, but may be somewhat cleared by these Positions. 1. The same Party cannot upon new Probation, much less upon the old Probation, accuse a person once assoilzied by an Affize, though he may accuse the Affize who assoilzied him, of wilful Error, and that even though he should thereafter willingly confels the Crime, for which he was formerly accused, though *Farin. quest. 4. num. 43.* thinks that he may be again pursued, and I should think that Confession favoured too much of madness, to be the Foundation of a Criminal Sentence. 2. Though the Pursuit was at the instance of the Party injured, yet his Majesties Advocat cannot again pursue upon the pretence of, *res inter alias acta*, for that were to keep people in a constant Suspense. 3. If the Pursuer did collude with the De-

Defender, so that the Defender was assilzied by a white Affize, in abstracting the necessary Probation; I think in that case, his own Fraud should not secure him, *Reg. Maj. lib. 4. cap. 28. ff. per calumniam procedat. vid. cap. 2. de collus. de reg.* but though the Defender was assilzied by conclusion betwixt the Defenders friends and the pursuer; yet I think the Defender cannot again be reconveened for the same Crime, since he was innocent, though the conclusion was advantageous to him.

X. By the death of the Offender, all punishment ceased, except in Treason & *crimine repetundarum*, or misemployment of publick Money, in *ceteris vero criminibus, ita demum pro delictis pena ab herede incipere potest si vivo reo accusatio mota est, l. ex judiciorum, ff. de accus.* : so that by that Law, if the pursuit was intended against the Father, it might have continued against the Son, to infer a pecunial Mulct, but this last holds not with us, amongst whom no Probation can be led in absence, except in Treason; but yet I think that a Civil pursuit, may be sustained for damage, and interest, and expences of a Criminal pursuit, even against the Malefactors Heir, as was also decided by the Senat of Savoy, *Cod. Fab. tit. de accusat. def. 15.*

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F I N I S.



A

# TREATISE

O F

## MUTILATION and DEMEMBRATION

Divided in two PARTS.

In the first whereof, the Name and Nature of these Crimes, and of *Proper* and *Improper Members* of the Body, are unfolded : The Doctrine of *Canonical Regularity* and *Irregularity*, from which that Distinction in order to Crimes descends, explained : Also the Method of pursuing and defending in these Crimes ; the Competency of the Judge ; the Order of Probation ; together with the Procedure of the Inquest, is set down.

In the second PART, the Punishments of these Crimes are handled ; *Retaliation*, which is the first of them, distinguished ; and the Practice of that *Species* thereof called *Pythagorical* or *Arithmetical*, refuted ; from the Opinion of Divines and Lawyers ; and even from the Opinion of the *Rabbies* : The other *Species* called *Aristotelical*, *Analogical* or *Geometrical*, reconciled to natural Equity, and to the Law of GOD. The Punishment of *Amputation of a Hand*, though in many Cases practised, yet, rejected from being the ordinary Punishment of these Crimes. *Arbitrary Punishments* asserted in place of both ; and a well regulated Arbitrary Power prov'd to be useful and necessary to Judges, for augmenting and diminishing Punishments, in these and in other Crimes, according to Circumstances attending the committing of them. And in both Parts the *Civil Law*, and the *Law* and *Customs* of this and other Nations are compared.

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By Sir ALEXANDER SETON of PITMEDDEN Knight Baronet, &c.

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By way of *Appendix* to the fore-going Book, written by the Learned Sir GEORGE MACKENZIE of Rosebaugh.

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E D I N B U R G H,

Printed by the Heirs and Successors of Andrew Anderson, Printer to the King's most Excellent Majesty. For Mr. Andrew Symson ; and are to be Sold by him in the *Congate*, near the Foot of the *Horse-wynd*, Anno DOM. 1699.

# TREATISE

MULTI-ALPHABETIC INDEX

Divided in two Parts

ERRATA.

The Letter N. relates to the Number in the Margin, and the Letter L. to the Line of the Number.

Num. 1. Line 4. f. likely r. like N. 4. l. 23. f. *jurum* r. *jurum* N. 6. l. pen. f. *Ducilatus* r. *Musilatus* N. 7. l. 9. f. *ipit* r. *ipit* N. 19. l. 1. r. f. irregular r. regular N. 20. l. 6. to *Dionys.* add *Halie.* N. 24. l. 1. f. *meo* r. *meo* N. 27. l. 17. f. *lib.* 12. r. *lib.* 22. l. 18. after *Hist.* add *Cent.* 1. N. 37. l. 5. f. *occasions* r. *affect* N. 67. l. 7. after *Affize.* add *But this must be upon some Speciality, and probably because many difficulties occur in the Decifion.* N. 71. l. 12. f. *of one other.* r. *one or another* N. 100. l. 6. f. *Hugo* r. *Ugo.* l. 7. f. *calitur* r. *caliter* N. 105. l. 18. f. *Lucia* r. *Lycid.* N. 125. l. 4. *dote* it. N. 167. l. 48. f. *legem* r. *legum.* N. 170. l. 7. f. *honore* r. *amore.* As for any other literal Errors, or Mistakes in the punctuation; the candid Reader is desired to excuse and amend them.

By Sir ALEXANDER SEYMOUR, Knight Baronet, &c.

By way of Acknowledgment to the Author, written by the Learned Sir GEORGE MACKENZIE, of Edinburgh.

Printed by the Author, at the Foot of the West-ward Wall, in the Church-yard, near the North-ward Wall, of the Church of St. Andrew, in the City of Edinburgh, 1799.

## To the Reader.

**W**Hen I gave the first of the following Sheets to Mr. *Andrew Symson*, that he might publish them, 'twas my Desire that my Name should be conceal'd, to the end that the Reader ( being left to his Conjectures about the Author ) might ascribe them to a person of greater Learning, whose Reputation in the World might add more Lustre to the Work than my obscure Name could do; But the Publisher by some mistaken Apprehension having prefix'd my Name, has thereby oblig'd me to premit the following Account beyond what the Introduction contains, which was all the Preface I at first design'd.

The occasion of my Writing was this; Mr. *Symson*, Minister of the Gospel, having in the year 1689. retir'd to this City of *Edinburgh*, relolv'd, according to the Apostles advice (a) to be quiet and to do his own business, and to work with his own hand, that so (b) he might not be chargeable to any; but, (c) eat his own bread; and (d) have to give to him that needeth. And in prosecution of this virtuous Resolution having taken himself to the Trade, he well understood, of publishing and selling of Books, desir'd from me and his other good Friends, to give him such Encouragement as might fall in our way.

Some of the Honourable Society of Advocats, Mr. *Symson's* Patrons and Benefactors, having advis'd him to publish a second Edition of the *Laws and Customs of Scotland in Matters Criminal*, written by the Learned Sir *George Mackenzie* of *Roseburgh*; and he being desirous that this second Edition might go out with some Addition, I was prevail'd with, though unfit for the Undertaking, to write the following Appendix, and the Subject being left to my own choice, I pitched upon the Crimes of *Mutilation* and *Demembration*, as these on which least had been written, and yet afforded variety of Matter both profitable and pleasant, whereof I hope the Reader will be convinced, after he has perus'd these following Papers.

For Methods sake, I have divid'd this little Work into two Parts; In the first whereof ( containing Matter *Medico-legal* ) I have spoken of the Names and Nature of these Crimes, and shew'd they can only be committed on proper Members of the Body; and from thence have taken occasion to describe both proper and improper Members, and to show how far the distinction betwixt them, arose from the Doctrine of *Canonical Regularity* and *Irregularity*; I have likewise set down some general Directions for forming a Libel, with the most remarkable Defects; and some Observations anent the Competency of the Judge; the Method of Probation; the Inquests their Procedure; intermixing now and then with Citations of Law, some pertinent Passages of History, to divert the Reader.

In the second Part I have consider'd the Punishments of those Crimes; and have handled *Retaliation* ( which is the first of them ) as a matter *Historico-theologico-juridical*; and refuted the Species thereof, called *Pythagorical* or *Arithmetical*; and reconcil'd the other Species, called *Aristotelical*, *Analogical*, or *Geometrical*, to Natural Equity, and to the Law of GOD. And that for clearing a Debate in the Books of Adjournal about *strict Retaliation*, I have also discourst of the Punishment of *Amputation* of a Hand, and rejected it from being the ordinary punishment of those Crimes, and have asserted *Arbitrary punishment*



## To the Reader.

ment to be the *Ordinary*; and described *Arbitrary punishment* in the General, and shoven how far a well regulated *Arbitrary Power* is useful and necessary in Judges; for satisfaction of some who are scandalized at the very Name of every thing call'd *Arbitrary*; and last of all, I have endeavour'd to clear the Sense of the ancient Statute of King *Robert the Second*, which declares the Life of the *Mutilator* to be in the Kings Will. All which is more particularly held forth in the *Summaries* prefixt to each Part, which, according to the Method of *Farinacius*, contain an Abridgment of the Heads they relate to.

In the performance of this Task, I have adduced the Testimonies of *Physicians*, *Divines* and other Authors, as the Subject of each of these Parts required, and have compar'd them with the Citations of *Civil Law*, and *D D.* and Decisions, in the Books of Adjournal, and have dispos'd them in such a Method as makes the Work altogether new, and yet no part of the *Criminal Law* needed more to be known, because the Crimes I treat of, have frequently occur'd, and must occur so long as the Wickedness of Man prompts him to Revenge.

These things being premitted concerning the Occasion and the Matter of the Appendix, I crave leave by way of *Apology* to represent; first, That when I enter'd upon this Task, I design'd to comprehend all I had to say, in six or seven Sheets; but one Thought following upon another, swell'd them to the Number they now appear in. Next, during all the time I was employed about these Sheets, I met with frequent Interruptions from a long and tedious *Suite of Law*, sufficiently known to be just on my part, where through I was obliged to give in every Sheet, as it was finished, to the Press, before I had time to digest another, to satisfy the Importunity of the Printers who frequently called for them: and this did so hasten and drive me, that I was forced to take Hours from my Sleep to Revise and Correct the Sheets. This *Precipitation* occasion'd some Literal Mistakes, and if even Errors in Matter should appear, (as I hope they

will not) I may be allowed to excuse myself in these words  
 † *Probabil. lib. 1. c. 1. N. 1.* of the Judicious Noote. † *quod nimia acceleratio sepe efficit ut Animus, dum pluribus intenditur, variet atque ad alia aberret quam sibi dicenda faciendave proposuerat;* providing I do frankly acknowledge the Errors how soon they shall be discovered; and this I not only promise to do, but also will think it my Honour;

after the Example of the famous *Papinian*; who (though he was dignified in Law with the splendid Titles of *Disertissimus* (a) *prudensissimus* (b) *acutissimus* & *merito ante alios excellens* (c) *homo excelsi ingenii* (d); and last of all with the Title of *Maximus Papinianus* (e) yet thought it no Derogation to yield to the Arguments of *Sabinus*, and to become his *Convertesed in contrarium* (says he, after stating his own Opinion) *me vocat Sabinus sententia* (f); and by so saying, to proclaim the Victory on *Sabinus* his side; and in another case *Justinian* cites him, changing his Thoughts, &c approves the 2d, before the first (g); and justly, for Reason should not be ruled by the Will, but have the command over it; this being that noble Victory of a man over himself, commended by *Plato* calling it *pulcherrimum victoria genus*.

(a) *l. fin. C. de instit. & substit.*  
 (b) *l. 14. C. de prad. min.*  
 (c) *l. 30. C. de fidei comm.*  
 (d) *§. sed quia 7. inst. de fidei comm. Hered.*  
 (e) *Novel. 4. C. 6. vers. sed & hoc.*  
 (f) *l. 6. §. 1. ff. de serv. export.*  
 (g) *l. 22. §. 3. C. de furt. et serv. cor.*

A  
**TREATISE**  
OF  
**MUTILATION and DEMEMBRATION**  
**PART I.**

WHEREIN the Name and Nature of these Crimes, and of *Proper and Improper Members* of the Body, are unfolded : The Doctrine of *Canonical Regularity and Irregularity*, from which that Distinction in order to Crimes descends, explained : Also the Method of pursuing and defending in these Crimes ; the Competency of the Judge ; the Order of Probation ; together with the Procedure of the Inquest, is set down. As also the *Civil Law*, and the *Law and Customs* of this and other Nations are compared.

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*Anno DOM. 1699.*

# TREASURY

OF

THE UNITED STATES

THE TREASURY DEPARTMENT  
HAS THE HONOR TO ACKNOWLEDGE  
THE RECEIPT OF THE SUM OF  
ONE HUNDRED AND FIFTY  
DOLLARS  
PAID TO THE ORDER OF  
THE UNITED STATES  
BY THE TREASURER OF THE  
UNITED STATES

THIS RECEIPT IS VALID FOR THE PURPOSES OF THE  
INTERNAL REVENUE ACT OF 1862

IN WITNESS WHEREOF  
THE TREASURER OF THE  
UNITED STATES  
HAS HEREUNTO SET HIS HAND  
AND SEAL  
AT WASHINGTON  
THIS \_\_\_\_\_ DAY OF \_\_\_\_\_  
A.D. 18\_\_





A  
**TREATISE**

OF  
**MUTILATION & DEMEMBRATION,**  
(by way of *APPENDIX* to Sir George  
*Mackenzies* *Criminals*: ) Divided in-  
to *Two Parts*.

**PART I.**

Wherein the Nature of the *Crimes* or *Delicts* of *Muti-*  
*lation* and *Demembration* is Considered, Together  
with the Method of *Pursuing* and *Defending*  
therein.

**Summaries.**

- 1 Introduction, Shewing the Design of this *APPENDIX*.
- 2 Mutilation and Demembration, by some are treated of among Injuries, and  
notimproperly; by others in the Title of Murder: with the Reasons why.
- 3 This *Traſſat* is divided into two *Parts*: The first *Part* treats of the nature  
of these *Crimes* or *Delicts*, together with the method of *Pursuing* and  
*Defending* therein. The second *Part* treats of their Punishments.
- 4 The several Accaptations of the Words *Mutilation* and *Demembration*, and  
of their Synonymous Words, *Mutilum*, *Mutilatum*, *Curtum*, *Decurtum*,  
*Desciſſum*, *Detruncatum*.
- 5 How the Word *Mutilation* is to be understood in *Cap. II. Stat. Rob. 2.* and  
in our later Custom of Speaking.
- 6 Mutilation and Demembration are Names of Crimes: and one who wants  
a Hand, or other Members on other occasions, is not properly call'd *Muti-*  
*latus* or *Demembratus*, ſed *Mancus*.
- 7 Mutilation and Demembration described and distinguished from Debilita-  
tion, which is the weakning of a Member, without taking away it's total use.
- 8 Mutilation (like Homicide) distinguished into *Voluntary*, *Necessary*, *Ca-*  
*sual*, and *Culpable*.
- 9 Mutilation and Demembration are call'd *Acts* of *Privat Violence*, to distin-  
guish them from *Acts* of *Punitive Juſtice*.

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- 10 Mutilation, *why described by the Word Hurting, and not Wounding.*
- 11 Mutilation and Demembration being committed on Members, are thereby distinguished from Homicide.
- 12 The last Words of the Description of Mutilation [ to that Degree that the Member ceaseth to be useful ] hold forth, 1. That the hurt Member must be useful. 2. That it lose its use. 3. That it be irrecoverably lost.
- 13 This leads us to enquire what is a Member, because it's in some cases allc'd that the hurt part of the Body is no Member.
- 14 Members divided in principal and subservient, and both described.
- 15 And in proper and improper, and both described.
- 16 The action and use of a proper Member described.
- 17 Though Mutilation be described, by it's rendering a Member useless, yet it is not thereby confounded with Demembration.
- 18 The Canonists in their Discourses of Canonical Regularity and Irregularity, give light to the understanding of the nature of proper & improper Members.
- 19 Canonical Regularity and Irregularity described.
- 20 Some Defects in the Body are Causes of Canonical Irregularity in the Roman Church, as had been formerly under the Levitical Law; from whence that Custom seems to have descended to the Heathen Nations; and last of all, came in to the Church of Rome.
- 21 Defects of the Body were either natural or accidental; and among other Accidents, were occasioned by the Crimes of Mutilation and Demembration, which sometimes rendred the Agent, and sometimes the Patient, and sometimes both, irregular.
- 22 A Rule taken from the Doctrine of the Canonists anent irregularity, whereby to know when Mutilation and Demembration is committed, in order to infer Punishment.
- 23 Of Members in particular; where, First, It's prov'd that the Eye is a proper Member.
- 24 A man may be demembred of his Eyes two ways: First, Formaliter, by having them designally pull'd out; which atrocious Crime hath been punish'd by Rerailiation.
- 25 Also a man may be demembred of his Eye, by it's being wounded to that degree, that it withers or consumes, and such a man is said to be mutilated Substanti liter.
- 26 The Eye may be mutilated, either by a total abolition of the Sight; or by such a diminution as renders the Sight almost useless: which is describ'd and illustrated by Examples.
- 27 Deprivation of the Sight as describ'd, infers not Mutilation.
- 28 The Tongue prov'd to be a Member in the proper Sense.
- 29 The Tongue is said to be demembred, when cut out by the Root.
- 30 The Tongue is said to be mutilated, when such a part of it is cut off, as hinders it to speak to Understanding, although the Law will hold him sanus as to R.d'ibition.
- 31 Whether the Lips be Members in a proper Sense.
- 32 Whether the Teeth be Members in a proper Sense? Arguments for the Negative.
- 33 Arguments for the Affirmative.
- 34 Arguments for the Negative Answered.
- 35 The Nose is a member in the proper Sense, prov'd by Authorities.
- 36 It's prov'd by Experience, which teaches that it is the only Instrument of Smelling.
- 37 An Objection Answered.

# Of Mutilation, and Demembration.

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**T**He design of this Appendix is, to treat of *Mutilation* and *Demembration* omitted by the learned Author of the foregoing Book. And if the worthy Gentleman had liv'd to favour his Countrey with a second Edition; it's likely he would have enlarged upon the whole Titles of his Book; and saved me the pains of this Addition, by writing on it to better purpose.

This Subject is handled in the Title of *Injuries*, by *P. Herodias. ver. judicat. 2 lib. 6. tit. 5. cap. 20. Matthæus de crim. tit. 4. cap. 20. Carpz. prax. crim. p. 2. qu. 99. N. 25. Wesenbœcius & Zoës. ad tit. ff. de injur.* and by many others; and even by the Text it self. §. 7. *inst. de injur.* And it cannot be denyed, but to cut off, mutilate, or disable a necessary Member of the Body, is one of the greatest Injuries that can be done to it; for not only doth it deform the Body, but renders it unfit for Action; and in many places makes the injured person incapable of the Office of the Priesthood, as we shall shew, N. 20. *infra*: So that these Crimes or Delicts are very properly handled in the Title of *Injuries*. Yet others, as *Covarruv. relist. de Homicid. Farin. prax. crim. 4. tit. 4. inst. 4. and Zoës ad tit. eccl. de homicid.* treat of them, in the Title of *Homicide* or *Murder*; as our Author very properly calls it; and these Reasons may serve to justify them. First, Because the sixth Command, *Thou shalt not kill*, *Exod. 20. 13.* prohibits these Injuries as Degrees of *Homicide*; and for this cause the political Sanctions added *cap. 21.* to explain and defend that Command, first of all declare the several cases of *Homicide* from *vers. 12. to vers. 24.* and then the cases of *Mutilation* and *Demembration*, *v. 24. and 25.* making this proportion betwixt the Punishments, that as Life must go for Life, so Eye for Eye; Tooth for Tooth, Hand for Hand, Foot for Foot. Secondly, These Crimes, because of their Similitude and Relation to one another, have many common Rules for judging them, which seems to be the Reason why they are coujoyned in our ancient Laws and Acts of Parliament; as *cap. 11. stat. Rob. 2. And Act 18. Par. 3. Ja. 4. and Act 118. Par. 7. Ja. 5.* But, this Controversie being of no moment, the Reader may append this small Treatise either to the Title of *Murder* or of *Injuries*, as he pleases.

I have divided this little Tractat in two Parts; In the first, I consider the Nature of these Crimes or Delicts, together with the Method of pursuing and defending in them. In the second, I consider their Pains and Punishments. The Matter of the first Part is, *medico-juridical*; and, for this cause, the Physicians and Lawyers have been mutually assisting to each other. And the cases resolved by them, are called, *Quæstiones medico-legales*. This Subject is useful to be known; and the wickedness and vindictive Nature of Mankind, has made the knowledge thereof necessary. As it's useful so it's difficult, and is acknowledged to be so, by *Fortunatus Fidelis*, a learned Physician, who having written a Book in *Q. Javos. de Relationibus Medicorum*, in which (for clearing the cases wherein Judges are in use to call for the Advice of Physicians) he *lib. 2. tit. 3. de Mutilatione*, introduces his Discourse with these words: *Hamul paron diffidentia quibusdam medicis interdum offertur, si quando a judice de mutilis est referendum; scio enim multos esse qui cum scientiarum titulo se venditent, quid tamen ipse sit mutilatio plane ignorant.* And the Difficulty appears in the different Sentiments about it. The second Part is *Theologico-juridical*, and hath many thorny Questions in it; especially about the pain of *Revelation*, which hath perplexed both Divines and Lawyers, and yet few have written on these two Delicts, as Delicts deserving punishment. It's true the *Canonists* have considered them as they are the Causes of Canonical irregularity; and many of the *Crolians* also have considered them as to that end; but they say little of them as they are punishable Crimes, which has induced me to



make this small Essay, hoping it may encourage others to do better; and if they discover any Mistakes, as perhaps they may, they'll do me a favour to correct them.

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For understanding the different Expressions of the DD. it's necessary to premit, that the words *Mutilation* and *Demembration*, are variously taken by Divines and Lawyers, as also by Physicians (whom Lawyers use to consult in such Matters.) By *Mutilation* we commonly understand the Cessation and Privation of the Office, and distinct Operation of a Member, albeit no Particle of it be cut off: And by *Demembration*, we understand the cutting off of a Member, and in this sense we find these words used in the Journal Books. But *Fortunat. Fidel. dict. lib. 2. sect. 5. cap. 1.* makes use of the word *Debile*, to signifie that which we call a *mutilated Member*, and of the words *mutilum, mutilatum, curtum, decurtatum, descissum vel detruncatum*; and of the Greek word *Colobon*, as Synonymous words, to signifie a Member wanting an extreme part; and cites the words of *Aristotle 5. Metaph. cap. 27. Mutila sunt, non cujusve particula privatione, nam si carnem aut splenem tollas, non propterea mutilus remanebit, sed si extremitatem, atq; hanc non omnem, sed quæ, totâ ablata, generationem non habet.* By which it appears that the Nature of *Mutilation*, according to *Aristotle*, consists in a Want or Defect of the extreme parts of the Body which cannot be repaired. And so *Galen de diff. Morborum*, cited by him, defines *Mutilum* to be, *cui pars aliqua corporis est præcisa*; and affirms, that *Mutilation* may be of Eye, Ear, Nostrils, and of any fleshy part; as of the Tongue when the half of it is cut off. And again, *dict. sect. cap. 2.* he cites *Galen. 1. de diff. puls. 11.* describing *mutilatos ac decurtatos pulsus*, to be, *quibus de priore magnitudine aliquid deest.* And in that same place *Fortunat. Fidel.* says, *non quancumq; substantia jacturum mutilum constituere, nam si quis à proximo ortu, aut sine manu prodierit, aut aure, aut parte aliqua similiter fuerit destitutus, non mutilum illum sed mancum propriè nuncupabo.* And so he confounds *Mutilation* and *Demembration*, and also makes them to be Acts of Violence. In like manner, *Barbasa, de off. & potestat. Episc. aleg. 42. N. 10.* by *mutilated Members* understands these, *quæ aliquo modo præcisa & obtruncata sunt.* And the *Gloss* and *Panormitan* in *C. de accus. in verb. Debilitatus* affirm *mutilum* dici, *cui membrum aliquod abscissum*; & *mancum* dici illum, *cui membrum debile factum.* And this sense of the Words is approved by *Covarruv. dict. reliq. 3. de Homicid. Num. 8. in fin.* *Calvin in Lexic.* following *Spigelius*, by the word *Mutilatus*, seems likewise to understand one who is demembred, because he explains the word *Mutilatus* by the words *corpore diminutus, Mutilati*, says he, *i. e. corpore diminuti.* And so the word is taken in *Gloss. ad §. 3. tit. 53. lib. 2. Feudor.* This is what *Mutilation* signifies according to the DD. above cited, and in the same sense is always taken by *Faviv. fragm. crim. part 2. Argument. de irregularitate quam quis contrahit propter quibri mutilationem. Num. 581. & seqq.*

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I find the word *Mutilation* in King Roberts said Statute; and in my Opinion, it's there taken for *Demembration*; for it's there said, *If any man mutilars another, or wounds or hurts him he forethought felony, and the Party grieved pursue him before a Judge, such Form and Order of Process shall be led against him, as is ordained against a Man-slayer.* Now either the word *Mutilation* must signifie *Demembration*, or it will follow, that *Demembration* is not in the Statute; and that *Mutilation* which is less than *Demembration*, is punishable as *Homicide*: For the following words of the Statute, ordain the *Mutilator* to be tryed by an Assyze, and if he be convicted, his Life to be redeemable; which shews that his Life, for committing that Crime, is in the Kings Will. And therefore for correcting this Mistake, the Act 28. Parl. 3. Ja. 4. conjoyns *Slaughter* and *Demembration*, without mention of *Mutilation*. In our later Custom of Speaking, and in all the Journal Books extant,

## Of Mutilation and Demembration,

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*Mutilation* signifies only the taking away the use of a Member, the Member still remaining with the Body; and so is a less Crime than *Demembration*, which (according to the notation of the word) signifies Otruncation, or a separating a Member from the Body; and some DD. do so understand and distinguish them.

It's further to be remarked, that *Mutilation* and *Demembration*, properly taken, are Names of Crimes, or if you please of Delicts, and so they are to be understood in these Laws and Acts of Parliament; and therefore it is, that in *Act 6. Par. 16. Ja. 6.* the Crime of *Mutilation* is expressed by that word in the Narrative of the Act; whereas the word *Amputation* is made use of in the Statutory Part, to express the Punishment of cutting off a Hand; and in like manner the words *abscindere* & *amputare*, are made use of to that end, in *l. 3. & Auth. seq. c. de serv. fugit. & novel 134. cap. 18.* And hence the DD. calls this punishment *pœna amputationis*. *Carpz. prax. Criminal. p. 1. qu. 4. N. 43, 45, 48.* This is the most ordinary way of expressing it; Yet I find mention of *pœna mutilationis membri*, in *Cabal. resol. crim. cent. 3. cas. 36. N. 25.* I observe also, that *Paulus* in *l. 10. ff. qui test. fac. pos.* making mention of one who lost his Hand by accident, makes use of the words *qui manus amisit*, and says not *qui Dutilatus vel Demembratus*. And such a one is rather called *Mancus* than *Mutilatus*.

*Mutilation* then, as it's the name of a Delict, may be described to be, *A 7* *voluntary Act of privat Violence, by which one hurts a Member of anothers Body, to that degree, that the Member ceaseth to be useful.* And this is commonly done by cutting the Nerves and Sinews by which the Member is moved. *Demembration*, is a farther degree of this Violence, by which a Member is cut off and separated from the Body. And *Debilitation* is betwixt the two, and signifies with us, the weakning of a Member without taking away it's total use. I say with us, for *Cabal. Cent. 3. resol. cas. 236. N. 23.* defines *Debilitation* to be *Impeditio principalis, & proprii officii ipsi membri*, which upon the Matter, is all one with *Mutilation*; and all others do the like, who confound the words *Mutilation* and *Demembration*, to signify the same thing.

I call *Mutilation* and *Demembration* [*Voluntary Acts*,] to distinguish them *8* from the like deeds done in Defence. And hence we divide these Crimes as our Author does Homicide, into Voluntary, Necessary, Casual, and Culpable; or more largely, as *Carpz. p. 1. qu. 1. N. 13.* to whom I refer: Or with *Zosf. ad tit. ex. de Homicid. N. 2.* we may reduce all to these four Heads, viz. *Voluntary*, and that is either unlawful: As when one intentionally designs to mutilat or dismember another without just cause; or Lawful, and that again is either Necessary and Defensive, when a Man does these Deeds in his own Defence. Or *Punitive*; such as is inflicted by Authority of the Magistrat. Or *Casual*, which falls out meerly by Chance: As if a Man defending himself, should accidentally hurt a By-stander. Or *Culpable*, which although it be not designed, yet it is not meerly by Chance.

We say [*An Act of privat Violence*] to distinguish it from Acts of punitive Justice. As when punishment of Amputation of a Hand is inflicted by Authority, which is also an Act of Violence, in that sense, in which a Man is said to dy a violent Death who dies by the hand of the publick Executioner. Such Punishments we read of, frequently in the Journal Books, to be inflicted upon notorious Robbers and Malefactors, as *6. Feb. 1618.* in the case of *James Douglass.* and *25. March 1667.* in the case of *Patrick Roy Mackgrogor* (and his Accomplices) whose Sentence was to have their right Hands first cut off, and then to be hanged.

We say [*Hurts a Member*] and not [*wounds it*]. First, to shew that *10* *Mutilation* and *Demembration* may be committed without a Sword or such like Weapon. And therefore the Justices sustained *Mutilation* of a Leg, committed by breaking thereof in Wrestling. *6. June 1627. Leslie against Harvie.*

*Harbo.* and 11. March 1631. *Cranford* against *Scot*; in both which Decisions, this Allegiance (*viz.* that the Leg was not broken *aliquo telo*, but in wrestling, in which the Pursuer might have been the Breaker of his own Leg) was propon'd and repell'd, in respect of the Libel bearing that the Pannel broke the Pursuers Leg in the wrestling, By violently throwing him on the Ground. And very justly, for even Homicide is sustained by the Law of God, *Exod.* 21. 18, 19, 20. tho' it was committed by a Stone or a Stroke, with the Fist, or beating with a Rod. Of this manner of killing see at length *Carp.* p. 1. q. 3. N. 19 & seqq. where he sets down the several cases, and it were easie to adduce many Decisions to this purpose. Secondly, By the word (*Harring*) we distinguish Mutilation from Demembration, which is committed by Amputation of the Member.

- 11 By the word (*Member*) we distinguish both Mutilation and Demembration from Homicide, which according to *Harprecht*: *S. Item. 7. inst. de pub. is violenta vite hominis adeptio*; or as *Farin. diff. q. 119. inspect. 1. N. 3. in fin.* it is *animati corporis p. nuptio*. And if it happen (as often it doth) that the Wounding or Amputation of the Member, be the Cause of Death, then he who gave the the Hurt or Wound, is punishable as a Man-slayer; and not as a Mutilator or Demembrator. *l. 15. ff. de Sicar.* (there says *Ulpian*) *nihil interest, occidat quis, an causam mortis prebeat.*
- 12 The last Words of the Description of Mutilation [ *to that Degree, that the Member ceaseth to be useful i. e. cannot perform its wonted Operations* *Car. 2. diff. prax. crim. p. 2. q. 93. N. 25.* ] hold forth. 1. That Mutilation and Demembration are commonly committed on useful Members. 2. That every Wounding or Disabling of a Member, infers not the Crime and Pain of Mutilation, though there be much effusion of Blood. *Abbas in c. 1. qui clerici vel vocantes. N. 8. Navar. ibid. N. 223. Suarez. de censuris dist. 44. sect. 2. N. 6.* But the Member must cease to be useful; and yet wounding, *per se* makes a Delict, punishable by the Judge Ordinary, that's to say the Sheriff, to whom the Justices are in use frequently to remit it. 3. That tho' the Member may, by the Stroke it receives, lose its use for a time, yet if it recover its use, the Action of Mutilation ceaseth; and by the practice of the Justice Court, Year and Day is allowed to expect Recovery; within which time, Action for Mutilation cannot be sustained: as we shall shew when we come to the Defences.
- 13 And this brings us to a main point, which is, to know what is meant by a Member of the Body, to infer the Crimes and Pains of Mutilation and Demembration. This I say is a main point, because the first Defence that uses to be proponed against a Libel of Mutilation or Demembration; as for Example of a Finger, is, that *digitus non est membrum*, whereof see a large Debate *Nrm. 52. & seqq. infra.* And to prove this, the Pannel or Defender appeals to the Testimonies of Lawyers and Physicians; wherefore it is fit we should inquire into their Opinions concerning the Definition of a Member.
- 14 *Membrum*, or Member, (which comes from the word *metior metiris*, to Divide, *Cabal. resolut. cent. 3. cas. 236. N. 2.*) is variously distinguished. First, Some are called Principal Members, which operate by themselves; such as the Tongue, in speaking; and others, *subservient*, as the Teeth and Lips, which assist the Tongue in forming of Words.
- 15 Again, Some are called Members in a proper and strict Sense; others, in a large and abusive Sense. The last of these includes all the organical and similar Parts; That is to say, the Flesh, Nerves and Veins; which are of the same Contexture throughout the whole Body, and in this improper Sense, a Member is defined to be, *A solid continued part of the Body, begotten of Commixtion of Humours, thickned and formed by the Strength of Nature.* *Arist. lib. 1. de hist. Animal. cap. 1. Galen. lib. 1. de usu partium. cap. 1. Fortunat. Fidel. de relat. medic. lib. 2. sect. 6. cap. 1. & 2. Zacchias quest. medico-legal. lib. 5. tit. 3.*



- 38 Those who deny the Nose to be the Instrument of Smelling, do acknowledge it to be the Instrument of other distinct Operations; and consequently a Member in the proper Sense.
- 39 The Ear describ'd: And distinguish'd in Internal, call'd Auris; and External, call'd Auricula. The first yielded to be a Member in the proper Sense, and the second controverted.
- 40 Physicians and Lawyers for the Negative.
- 41 Physicians and Lawyers for the Affirmative.
- 42 Suares and Zacchias agree to the Affirmative, hic & N. seq.
- 43 If Amputation of a part of the Auricula, infers Demembration; Asserted by Suares, Denied by Zacchias, and so decided.
- 44 The Chin no proper Member according to Farinacius; and therefore the cutting off of the Chin infers not Demembration, but yet is punishable as a Delict or Riot.
- 45 The Beard is no Member, yet the cutting off thereof against the Owners will, is severely Punishable, even pœna incidentis membrum, according to Baldus.
- 46 The Paps or Duggs of a Woman are Members in a proper Sense.
- 47 Whether or not the Spondyls or Vertebrae be Members in a proper Sense.
- 48 Castratio virilium is a most atrocious Demembration, and severely punishable, hic & N. infra.
- 49 The Hand, how taken in a large Sense, and how in a narrower Sense.
- 50 The Hand, because it performs most useful & distinct Operations, is without all Debate, a most useful and proper Member.
- 51 The Leg is also an useful and proper Member.
- 52 Whether the Fingers and Toes are Members per se, or only parts of the Hands and Feet, is not agreed among the DD.
- 53 For the Negative, viz. that Digitus non est Membrum, are Bartolus, Baldus, and many others, both Lawyers and Physicians.
- 54 Fr. Suarez seems to agree with the Negative.
- 55 Cajetan and Soto are for the Affirmative.
- 56 Suarez acts the part of a Reconciler betwixt Cajetan and the other DD.
- 57 Digitus found to be Membrum, by many Decisions in the Books of Adjournal.
- 58 Arguments to justify the Decisions.
- 59 Whether it be more proper to say, the Fingers are demembred, or the Hand is demembred of the Fingers, according to Fortunat. Fidel.
- 60 Answers to some Laws adduced by the DD. to prove that the Fingers are no Members.
- 61 The Toes or digiti pedis are properly Members, as the Fingers of the Hand, because of their usefulness.
- 62 Wonderful Performances done with the Toes of such as have been Born without Hands.
- 63 Detruncation of a Withered Hand, infers the Crime and Pain of Demembration.
- 64 The cutting off of a proper Member from a dead Body, doth not infer the Crime or pain of Demembration.
- 65 The use of this Discourse of proper and improper Members, is for the understanding of general Statutes concerning Members.
- 66 All Judges competent in Homicide, are likewise competent in the Crimes of Mutilation and Demembration.
- 67 Barons of Barony are not competent Judges, neither is the Privy Council.
- 68 Though the Privy Council cannot decide, yet they can pr. cognosce, and discharge the Justices to proceed.

- 69 *Five Cautions for forming the Libel.*
- 70 *The Defences are dilatory, or peremptory; and both described.*
- 71 *The first dilatory Defence against Mutilation is, that Year and Day is not elaps'd since the committing of the Crime; with the Reply thereto.*
- 72 *This Defence takes no place against a Libel of Demembration.*
- 73 *If the Pursuit be both for Mutilation and Demembration, the Pursuer may pass from the Mutilation, and Insist within Year and Day for the Demembration.*
- 74 *The second dilatory Defence is, that the Case is submitted.*
- 75 *The first peremptory Defence is, that the mutilated Member is recovered.*
- 76 *The Defence of Recovery, is only relevant against a Libel for Mutilation.*
- 77 *The second peremptory Defence is, that the Case being submitted, the Arbiters have discerned.*
- 78 *The Justices of-times recommend to the Parties to submit.*
- 79 *Mutilation and Demembration, are but privata delicta.*
- 80 *The third peremptory Defence is, that the King has remitted the Crime.*
- 81 *The fourth peremptory Defence is, Disimulation: but this must be very apparent and evident, otherways it's not relevant.*
- 82 *The fifth peremptory Defence is, Res judicata.*
- 83 *The sixth is a good Defence, that the Council have precognosc'd and discharg'd the Justices to proceed.*
- 84 *Sometimes the Council remit to the Justices to precognosce.*
- 85 *The seventh Allegiance of Self-Defence is relevant here, as in Homicide.*
- 86 *Self-Defence is not relevant against one clothed with lawful Authority.*
- 87 *The eighth is a good Defence that the Wound was Curable, and the Mutilation or Demembration was ex malo regimine.*
- 88 *All who are Actors Art and Part, are lyable.*
- 89 *Whether it be a good Defence that the Party mutilated or demembred was at the Horn.*
- 90 *A Pannel at the Horn, must relax before he can be allowed to propene his Defences.*
- 91 *If strict Retaliation be crav'd in the Libel, the Pannel must debate how far the Jewish Retaliation is obligatory.*
- 92 *It is a good Defence that the Pursuer did Mutilat or Demember himself.*
- 93 *Whatever Defence is competent against Homicide, is also competent against Mutilation and Demembration, mutatis mutandis.*
- 94 *Two things to be noticed in the Probation of these Crimes or Delicts.*
- 95 *1. What's evident to the Judge and Inquest by Ocular Inspection, needs no further Probation.*
- 96 *2. If Mutilation be only pretended, then the Trial must be either by the Oath of Calumny of the Party pretending to be Mutilated; or by Witnesses; or by Skillful Chirurgeons, who must declare their Opinion upon Oath.*
- 97 *The Testimony of Physicians and Chirurgeons, is not probative, unless upon Oath, which is agreeable to the Opinion of the DD. and the Practice of Forraign Courts. Three Cases wherein they not obliged to Swear.*
- 98 *Affisers should be persons more than ordinary intelligent. It's also necessary that Advocats study the Questiones Medico-Legales.*

3. *qu. 1. N. 5. 6. & 7.* where he cites *Avicenna* the Author of the Definition. But in the strict and proper Sense, a Member is defined to be a Particle, or part of the Body, not circumscribed on all sides, nor joyned every way to the Body, nor to another Member of the Body. And this agrees to all the extreame parts of the Body, and makes them to be proper Members. And so *Fortunat. Fidel.* defines it, *dist. cap. 1.* And he takes it from *Aristotle* and *Galen.* and *Covarruv.* follows it, *Init. relect. 1. de homicid. N. 8.* But they both and *Zacch. dist. loc.* give this as the more common and received Definition, viz. That it is a part of the Body, performing a proper and perfect Action and Operation, which no other Member can perform, and which ceaseth to be performed, if that Member cease to be. And this Definition is embraced by *Suarez. de censuris. disp. 44. sect. 2: N: 6.* who in equivalent words defines it to be, that part of the Body *Qua est quasi integrum instrumentum proximum alicujus actionis;* and sayes, that this the *Summists* hold for a Rule, herein following *Panormitan,* *Bartolus,* *Baldus* and others, who, sayes he, put this Sense upon it in their Disputations anent the sense of this Statute punishing Mutilation. And the same is embraced by *Caball. Num: 4. & seq:* where he compares the Body of Man to the Structure of a House: and the proper Members, of the Body to the Hall, Chambers and Kitchen, which have distinct uses in the House; and the improper Members to the Stones of the House, which are of the same Contexture throughout all the House, but have no distinct use in it. And for this he cites *Bartolus* and *Baldus,* and many others upon divers Texts; but chiefly in *l. 2. ff. de publ. judic. & l. si fugitivi. c. de servis fugit. Caballus dist. cap. N: 113.* makes another Division of Members, viz: in *instrumentalia & formalia,* & ex his alia majora alia minora. de quibus late tradunt *DDi in l. 2. ff. de publ. jud. Baldus in l. 3: l. de accusat; & in l. de a opera C. iis qui accus. pos.* and others cited by him.

And again the said *Fortunat. Fidel: dist. cap. 2. imprim.* describes the Action<sup>16</sup> of the Member; for Example of the Hand, to be it's motion towards the object; and it's Use to be the apprehending of the Object. So that now it's easie to resolve what it is to mutilate a proper Member. viz. nothing else but to make it incapable of moving to, and apprehending of the Object.

But then some object and say, that if it be necessary to the Essence of Mutilation<sup>17</sup>, that the Member be so totally disabled, that it's for no more use to the Body; it's all one upon the matter to Mutilate and Demember, and so Mutilation and Demembration, which we define as distinct Crimes, are confounded. This Objection is moved by *Suarez. dist. disp. 44: §2. N: 3.* where he distinguishes and defines these two Crimes, as we do, from the Authority of *Panormitan in Clement. Unic. de homicid.* and yet answers to the Objection; that suppose the Fault were equal, yet the Effect is not simply the same, which is sufficient for not extending the punishment. Next, he says, the Damage in both is not equal, because the Deformity is not equal. Moreover a withered Hand has still the name of a Hand, and of a Member so long as it's affixed to the Body; as we shall shew when we come to speak of the Hand in particular.

The next thing, that falls in my way, is to speak of each particular part of<sup>18</sup> the Body separatly, and to shew which of them falls under the Definition of a proper Member, and which not: And because we have much Light from the Canonists in this Point (who describe the Nature of Members; and of Mutilation and Demembration committed upon them, in order to clear the Nature of Canonical Regularity and Irregularity) I crave leave to digress a little upon this Subject, and to shew how it's concerned with the Crimes of Mutilation and Demembration.



- 19 To be irregular then, in a canonical Sense, is to be entered in one of the Religious Orders of the *Roman Church*, and to be subject to the Rules of the Order, whence is the Denomination of *Regular*; and Irregularity is to be under a Canonical Impediment, that hinders to enter into the Order, or to remain in it, if entered. *Covarruv. init. relect. de Homicid. N: 1.* And the Denomination of Canonical comes from the Word *Canon*, (which also signifies regular) because the first Institution of this regularity in the Christian Church, is from the Canons of the Church. *Covarruv. N. 2. ibid.*
- 20 Among the Causes of Irregularity, introduced by these Canons, to exclude a Man from holy Orders; this is one; that a man is vitiated or defective in his Body. This was first established among the *Jews*, *Levit. 21.* It came from them to the Heathen Nations, among whom we find it. *Plin: lib: 7: nat: hist. cap: 28. Seneca lib. 4. declam. 2.* particularly, it was among the Romans, *Dionys: lib: 2: Romanarum antiquitatum.* And among the Persians, *Alex. ab Alex. lib. 6. dierum genial. cap: 14.* and came last into the Roman Church by the Canons of *Gelasius* and *Honorius* Bishops of *Rome*. *Dist: 53. c. 1. & 2.* The words of the last are, *Pœnitentes vel infcii literarum, aut aliqua membrorum damna perpeffi, ad sacros ordines aspirare non audeant.* which has it's Declarations and Restrictions in the other C C. of that *Distinction*; and in the *Titles of the Decretals*; *de regularibus & transeunt. ad Relig. & de Corp: vitiat. ordinand: vel non.* All explained by *Parnormitan. Covarruv. dict. relect: de homicid. Zoes. de homicid: Farin. fragm. part 2. N. 401. & seqq. Suarez: dict: disp: 44: sect. 2.*
- 21 This Defect of the Body as it was sometimes by Nature, and by accident; so oftentimes it fell out by the Crimes of *Mutilation* and *Demembration*: And the *Committer* became irregular, by doing the fact; *Clem. unic. de homicid.* except in the Cases there excepted; As also the *Patient*, if either it did render him incapable to discharge his duty; or left a Cicatrice in his Face, or other visible Deformity. *Covarruv. dict. relect: part: 3. N. 8.* whereby many persons, sufficiently qualified to bear Office in the Church, were made incapable of bearing it: which occasioned some of the *Canonists*, and *Civilians* following them, to contract the Number of proper Members of the Body, into a lesser compass than probably they would have done, if it had not been to restrict the Number of the Cases of Irregularitie.
- 22 From this Digression, I draw this useful Rule to our purpose. *That in all the cases wherein the Canonists conclude the Committer of Mutilation and Demembration to become thereby Irregular, we may conclude him by the same facts, to be liable to the punishments enjoined by our Laws for the same Crimes: tho' we cannot on the other part agree with them in all the cases wherein they think Mutilation is not committed; because where there is any doubt concerning the Nature of a Member, if it be properly a Member or not, in order to punishment, much is left to the Arbitriment of the Criminal Judge. as Paulus Zacch: does frequently acknowledge, dict: tit: 3. qu. 3: N: 7: in fin. & qu: 4: N: 27: & 31. and qu. 5: N. 28. in fin.* So that the Judge may go further in finding *Mutilation* and *Demembration*, than the *Canonists* do.
- 23 And now I come to inquire into the Nature of each Member in particular; And in the first place, it's granted by all Lawyers and Physicians, that the Eye is a Member of the Body in the most proper and strict sense: Because it performs the Action of *Seeing*, which no other Member of the Body can perform, and which Action ceases to be performed, when the Eye ceases to be.

*Demembration* may be committed on the Eye two Wayes. First, *Forma-24*  
liter, by pulling out the Eyes; and this is so atrocious a Crime, that it de-  
serves the severest punishment, both for the Design, and because this Member  
is most useful in foreseeing the Dangers of the Body, and directing it in all it's  
other Actions and Operations; as also because, by it's being put out, the Bo-  
dy is deprived of all it's lawful pleasures, and especially of the Benefit of Read-  
ing, which instructs the Soul. The punishment of this Crime, demonstrates the great-  
ness of it *Leo Novel. suag2* commands the Eye of him who pulls out one Eye to  
be likewise pulled out; and if he have pulled out both Eyes, to lose but one,  
not that he thereby intended to favour the *Delinquent*, but the Party injured;  
for, as he there saith, the Man who was made blind, had no advantage by  
the *Delinquents* being made blind, therefore he restricted the punishment to  
one Eye, and instead of the other, he commanded that the *Delinquent* should  
aliment the Man whom he had made blind. To this *Quintilian* doth agree,  
*declamat 297. qui excæcuerit aliquem aut talionem præbeat, aut excacati dux*  
*fit.* This was in case the *Delinquent* was Rich, but if he were Poor, he was  
to lose both his Eyes. But *Joannes Dubravius*, Bishop of *Ulm. lib. 12. hist.*  
*Bohem.* cited by *Camerarius. meditat. hist. cap. 99.* Reports, that the Empe-  
ror *Charles the fourth*, sitting in Judgement, caused a Sentence to be pro-  
nounced against *Zachora* a Nobleman of the Empire, to lose both his Eyes,  
for pulling out both the Eyes of a Priest without any Provocation, save on-  
ly that he did reprove him for Errors, not considering that he was his Pa-  
tron. The Crime indeed was atrocious, and therefore the Defences proponed  
by *Zachora*, viz. That he did it in passion, was penitent, and had ingenu-  
ously confessed the Crime, and was willing to pay any Ransome the Judges  
should decern; were all repelled and no regard had thereto.

Secondly, *Demembration* may be committed by so wounding the Eye, that<sup>25</sup>  
the Substance of it withers and decays. *Farin. fragm. p. 2. N. 596.* This he  
calls *mutilari substantialiter, vel demembrari, & corpus oculo privari.* And  
this seems to have been the case of the Pursuit before the Justices, 18. June  
1642. at the instance of *Andrew Alexander* and his Father against *David*  
*Young*, eldest Son to *Young of Kirkton*, for putting out his left Eye with a  
hard Clay Bullet from a Pluff, & thereby demembring him of that Eye which  
was his only Eye, the other being lost by the small Pox. No Decision  
followed on it, because the Parents transacted for their Children, in respect  
they were but young Boys at the School, and the Crime was considered as  
done, *ex lascivia & non ex dolo.*

The Eye is mutilated either by a total Abolition of the Action of Seeing,<sup>26</sup>  
which is when no sight remaineth; or by a Diminution of the Sight to that  
Degree, that there remains no sufficiency to direct a man to walk in the way  
without help, and which among other Causes may be occasioned by a Wound  
in the Forehead above the Eye-brows transversely, which makes the Flesh to  
press down-ward upon the Eye, and to obstruct it's opening. *vid. Fortunat.*  
*Fidel. lib. 2. de relat. medic. cap. 4.* And also it may be occasioned by a Stroke  
on the Head, which makes a Desfluxion to fall on the Eye, producing (as  
it often times comes to pass) a *Cataract* on the Eye, or a thin Skin, which  
we commonly call a *Slough* or *Striffen*, or *Film*: And therefore the Justices  
8. July. 1643. found a Libel at *Logies* instance against *Howison* Portioner of  
*Cramond*, bearing, that the Pannel had mutilated his Eyes to that Degree,  
by such a Stroke on the Head, relevant to infer the Crime and punishment of  
*Mutilation.*

But a Depravation of the Action of Seeing, (which is when the Object  
appears double, or otherwise than it should) does not infer *Mutilation*: tho<sup>27</sup>

- it be a *Delict*, or *Ryot* punishable in suo genere. *Caballus dicto casu* 236. N. 123. calls it *Deturpation*, & says that *debilitatio membri* [meaning *Mutilatio*] being nothing else but *impeditio principalis & proprii officii ipsius membri* it followes, that *oculus non dicitur debilitatus, si quis uidet ut prius, licet propter icum, oculus sit deturpatus aliquantulum*.
- 28 Secondly, The Tongue is acknowledged by all to be a Member in the proper Sense, because it performs the distinct operation of Speaking, and besides it contributes to *Deglutition* and *Mastication*. *Bartolus, & alii D D. in l. ff. de pub. j. d. col. ult. N. 13. & l. Si cui lingua ff. de Edil. edict. Cabal. dict. cas. 236. N. 9.* where he mocks *Capola*, for denying it to be a Member, on no better reason, but that it performed all these Actions.
- 29 *Demembration* is committed, if the Tongue be cut out by the Root; which may be done without danger of Life. And there can be no more speaking, unless it be by a Miracle, like that which the Emperour *Justinian* in l. 1. in prin. c. de off. praefect. prator. *Afric.* testifies of the venerable *Confessors* whom he saw in *Africk*, *Qui abscissis radicibus linguis, penas suas miserabiliter loquebantur*, related their case after their Tongues were cut out by the Roots at the command of *Honoricus* King of the *Vandals*.
- 30 *Mutilation* is committed on the Tongue, by cutting a part of it, whereby it is rendered incapable to speak, at least to be understood. And yet a person with a mutilated Tongue, or who has any impediment in his speech, may be *sans* as to exclude an Action of *Redhibition*. *per l. 10. §. ult. ff. de Edil. edict.* where *Ulpian* says that *Balbus, Blasus, Atypus* isq; *qui tardius loquitur, varius & varius, sani sunt*; But if it be true that the Tongue being a fleshy part, will grow again, and speak as well as formerly (which *Zacch.* in dict. tit. 3. qu. 5. N. 28. testifies to be from Art and Experience) then *Mutilation* is not committed by cutting off the tip of the Tongue, at least some time must be allowed to expect Recovery.
- 31 Thirdly the *D D.* deny the *Lipps* to be Members of the Body in a proper sense, because they perform not a distinct Operation; but only concur as instruments with the Tongue in forming of Words. *Arist.* 2. de part. animal. 16. *Zacch. dict. tit. 3. qu. 4. N. 30. Fortunat. Fidel. §. 6. cap. 2.* and among the Lawyers *Covarruv. dict. init. relef. de Homicid. part. 1. N. 8. Farin. Fragm. part. 2. N. 587.* And therefore according to them *Mutilation* or *Demembration* cannot be inferred from hurting or precluding the *Lipps*; but they grant they are *Injuries in suo genere*, because they take away an usefull part of the Body for helping of Speech, and that the want thereof creates a seen *Deformity*, by exposing the inward part of the Mouth to publick view, and so by the Canon Law makes the Patient, canonically irregular, tho' not the Agent; because he did not preclude a Member *Covarruv. Relef. de Homicid. quest. 3. init. N. 8.* This is one of the Cases remitted to the Arbitriment of the Judge *Zacch. dict. tit. 3. qu. 4. N. 31.*
- 32 Fourthly the *D D.* conclude the Teeth to be no Members of the Body in a proper sense, *Farin. fragm. part. 2. N. 585.* because, says he, they make not up the Integral or Consistence of the intire Body, but do only belong to the Beauty and Ornament of it; As also that they performe no proper Action, but only assist the Tongue, as the *Lipps* do, in forming of Words, So *Cabal. Cas. 236. N. 12. & seqq.* and the *D D.* cited by him *Covarruv. init. Relef. part. 3. de Homicid. N. 8.* Further they adduce the words of *Paulus* in l. 7. ff. de Edil. edict. *Cui Dens abest non est morbosus, magna enim pars hominum a liquo dente caret, neque ideo morbofi sunt, praesertim cum sine dentibus nascimur, nec ideo minus sani sumus donec dentes habeamus, alioquin nullus senex sanus esset.* And to these Lawyers, the Physicians agree, viz. *Fortunat. fidel. dict. lib.*



2. *de relat.*, §. 6. cap. 2. *Zacch. diſt. tit. 3. qu. 5: N: 19.* Who ſays, that the want of Teeth may be made up by Art, if they be not all excuſſed; meaning that the Artificial Teeth may be tyed to thoſe that remain, and they conclude that ſeing Mutilation and Demembration can only be committed upon proper Members, they cannot be committed by excuſſing of the Teeth.

But notwithstanding, there is much to be ſaid for the affirmative. For, 1. <sup>33</sup> *Zacchias* ſeems to grant, that if no natural Teeth remain but all be excuſſed, then there is a clear Demembration. 2. As the Teeth concur with the Tongue in forming of Words, ſo they performe a ſpecial Action in grinding or chewing the Meat for the Stomach, whence they are called Grinders: And the decay of them reckoned among the Forerunners of Death, *Eccleſiaſt. 12. 3.* 3. They are ranked by *Moses* with the Eye, Hand and Foot in the Law of Retaliation, *Exod. 21. 24.* and its yeilded by all that Eye, Hand and Foot, are Members in the proper ſenſe. 4. They concur in Maſtication.

And to the Arguments for the Negative, I anſwer; firſt, That the Gloſs on <sup>34</sup> the ſaid Words of *Paulus l. 11. ff. de Edil. ediſt.* acknowledges the Reaſon of the Law to be bad; and if it were good, it would likewise prove, that a hand is no proper Member; becauſe ſome are born without a hand, and may live and be ſerved without it. 2. It is of no import that the want of a few Teeth may be ſupplied by Art, for ſo may the want of a Hand or Foot; and a man can go upon ſtumps, where both Legs are wanting.

Fifthly, the Noſe is a Member in the proper ſenſe; for this we have; firſt the <sup>35</sup> Authority of Naturaliſts and Phyſicians as *Ariſt. lib. 1. de part. animal. Hippocrat. lib. 1. de diata. Valeſ. controu. lib. 2. contr: 26:* And among the Lawyers, *Farin. in append. de immunit. Eccleſ. Cap: 6: N: 249: & in Fragm: p: 2: N. 587.* where he defines a proper Member by its quality of exerciſing a diſtinct Operation: and for examples condeſcends on Hands for graſping; Feet for walking; Eyes for ſeeing; Ears for hearing; and Noſe for ſmelling: So that according to him, the Noſe is as properly a Member as any of the others named; and hence he concludes, that he who Mutilats or Demembers the Noſe, or any of theſe other Members, becomes thereby irregular, (which could not be by preſcinding or Mutilating an improper Member, for this he denies, *N. 585. ibid.*) and conſequently by ſo doing he incurs the Crime and Pains of Mutilation or Demembration: For to be guilty of the Crime in order to puniſhment and to become irregular, are equipollent in the Canon Law as we ſaid before *Nun. 22.* And for the ſame cauſe, *Zacch. diſt. qu: 4. N. 3. & 5.* concludes in the general; *Naſo mutilato, ea omnia locum habent, qua in ceteris mutilatis membris habere diximus.* And again, *in eum qui nares abſcidit, non modo pari ratione, ut in eum, qui aliud quodcunque membrum abſcidit, ſed majori ſeveritate animadvertitur non ob id tantum, quod hac pars unica in noſtro corpore ſit, & nequaquam duplicata, ut Oculuſ, Manuſ, Peſ, Auris, Labium, ſed quia realiter majus multo dedecus affert abſciſſio Naſi, quàm alterius cujuſcunque partis, etiam ipſius manuſ.* And cites *Paris a put: de re milit: lib: 8: cap: Quando unus eff: ocul. alter & alter abſcid: naſ. Videtur ergo quacunque leges de membris, de eorumq; mutilatione ſanciverunt, rectè ad naſum etiam ſunt transferenda.* Theſe are the words of *Zacchias*, which are only applicable to corporal and not to canonical Punishments.

That the Noſe is a Member in the proper ſenſe, is alſo evident, becauſe it <sup>36</sup> only, and no other Member, exerces the Function of ſmelling: For this, we have common Experience; every one offering an Odoriferous thing to the Noſe.

Its objected, that the Argument drawn from ſmelling doth not conclude; <sup>37</sup> becauſe many men who have expanded Noſtrils want the ſenſe of ſmelling;

*ex: gr:* when a Destuction of Salt and thickened Humors falls upon the Lungs, Mouth and Noftrils from the Ventricles of the Braine, by the Nerves of *Smelling*; This distemper ( which the Physicians call *Coryza* ) will obstruct the sense of *Smelling*, ( even when the Noftrils remain patent ) as sometimes a worse Disease doth, where it occasions *os cribrosum*. To which it is answered, that accidental Distempers do not change the nature of Members, for a Hand or Foot, may lose their proper use by a palse or other accident and yet we cannot from hence infer that they are not proper Members.

38 But suppose that it were granted that the Nose is not the proper Instrument of smelling, yet it is still a Member in the proper sense, because these who deny it to be the proper Instrument of smelling, ( *viz.* *Fortunat. fidel. lib. 2. de re lat. medic. §. 2: cap. 1.* And *Paris a pteozubi supra*, N. 2. And *Galen. in lib. de instrum. odor.* ) Yet do grant that it hath divers other distinct Operations; As that it's the *Tubulus* or conduit, by which the *Mucus* descends from the *Brain*; And is the chief Instrument of *Respiration*; As also of *Sounds*: So that where the Nose is wanting, the sound of Words is not distinct: By which Concession, the Nose must yet be a proper Member, according to those who deny it to be the proper Instrument of *Smelling*; because it exercees the other three Functions. As *Taliacotius* proves *chirurg. nov. lib. 1. cap. 6.*

39 Sixthly, there is greater difficulty to determine whither the Ear be a proper member or not; to clear the Question, know that the Ear is defined by *Arist. l. 1. de hist. animal.* to be that part of the Head which is fabricated for hearing. We must distinguish here betwixt the *internal Ear* called *Auris*, and the *External* called *Auricula*, which is the Cartilaginous Substance guarding and defending the *Auris* from Danger, and with us is commonly called the *LUGG*, yet tho' the Words *Auris* and *Auricula* be so distinguish'd, they are promiscuously used in speaking, and nothing is more frequent among the *DD.* than *abscindere Aurem*; & *quod, Auris sit ornamentum corporis.* *Zacch. quest. medico-leg. lib. 10. Consil. 35: N. 2.* That the *Auris* is a proper member, is acknowledged by all, because it is the sole Instrument of Hearing, and therefore if any deed be done to prejudice the *Auris*, so as to deprive it of the Faculty of Hearing, it infersthe Crime of *Mutilation*; nevertheless it is contraverted whether the *Auricula* or external Ear be a proper Member.

40 These among the Physicians who deny the *Auricula* to be a proper Member, are *Fortunat. fidel. §. 6. cap. 2.* *Zacch. quest. medico-legal qu: 4. N. 26. & seqq. & consilio 35.* where he says that being consulted in the case of a Clergie man who had lost the upper part of his *Auricula* or external Ear, by a Wound in *Rixâ*; whether he thereby became irregular and incapable of Promotion, as one who wanted a Part of a proper Member? He resolved ( *N. 13.* ) that the *Auricula* was no proper Member, nor reckoned among proper Members by any man, and that therefore the Canonists with much justice had declared, that the Abscission of the Ear infer'd not irregularitie. With those, several Lawyers do agree, as *Covar. init: part. 3. Releç. de homicid. N. 8. vers. incip. primum.* where he expressly affirms, that when the *Auricula* is cut off, a Member is not cut off; because, the *Auris* is properly the Member, and the *Auricula* or Cartilaginous Substance, is rather for Ornament and Safeguard to the *Auris*, than for use to the Body; and for this he cites *Baldus in l. serv. fugit. ad fin.* *Farinatus* is of the same Opinion, in *diç. fragm. part. 2. N. 590.* where he cites *Covar. Navar.* and divers others; distinguishing betwixt *Auris* and *Auricula*, and these Doctors urge for themselves the words of *Ulpian* in *l. idem offilius 10. ff. de Edil. editç.*

41 But for the affirmative there are others of no less Authority; First, among the Physicians, *Galen* in *lib. de instrum. odoris*, and among the Lawyers the *Gloss* in *c. singula. verb. Oculus 89. distinct.* And *Majol.* cited by *Farin. in fragm.*

part

part. 2. N. 591. affirming that if the Law of irregularity had been in S. Peters time (as it is a humane Constitution of a latter date) he had been declared irregular (and consequently a *Demembrator*) for cutting off of *Malchus* his Ear, unless he had been excused for defending his Master. In the same opinion is *Speculator in tit. de dispensat. §. juxta. Num. 8.* Likewise *Suarez. de Censuris disput. 44. sect. 2. N. 9.* asserts that the *Auricula* or outward Ear is a Member in the proper Sense, and rejects the Opinion of *Covarruv.* upon this Reason, that the *Auricula* Co-operates with, and contributes much to the Organ of Hearing, and from thence concludes, that the Amputation thereof infers Irregularity, and that not upon the account of Deformity, occasioned by the want of the *Auricula*, (that being obscured by the Hair) but because of *Demembration*, in respect that Deformity without *Demembration* (which he expresses by the Word *Mutilation*) makes not irregularity.

As *Suarez.* believes the Crime of *Demembration* to be committed by Amputation of the *Auricula*, in regard of its contributing to the Organ of Hearing; so P. *Zasch. in dict. qu. 4. N. 24. 27. 28.* though he denies the Ear to be a proper Member, yet he confesses it contributes much to the Organ of Hearing, and that a sound, without it, is like the Noise of the running of Water, and therefore allows the Lawyers to count the *Auricula* among the proper members in order to infer the Crimes and Pains of Amputation. *in quo casu (inquit) bene dicitur aurem esse membrum, quia abscindens aurem eisdem penis subicitur, quibus subicitur abscindens membrum. Unde etiam in Auris abscissione habet locum id, quod in abscissione membri quoddam immunitatem ecclesiasticam, quā abscindentes membra in ecclesia non gaudent,* and concludes his Discourse N. 31. by remitting all to be determined by the Lawyers. Now, all this must be understood of the outward Ear or *Auricula*, because the *Auris* or inward Ear cannot be abscinded.

But then a Question remains to be answered, whether or not the Amputation of a part of the *Auricula* be sufficient to infer the Crime of *Demembration*? and the same may be urged as to the Amputation of a part of any other Member. *Suarez. dict. disput. 44. Sect. 2. N. 8. in med.* says, that its sufficient for *Mutilation* [ meaning *Demembration* ] that there be either *integra abscissio, vel gravis diminutio alicujus principalis membri*, and he there speaks of the *Auricula* ( for there could be no Abcission of the *Auris*, either in whole or in part ). *Zasch. dict. consil. 35. N. 8. & 9.* maintains the contrary, and especially as to the Ear, where he says that the abscission of a part, and chiefly of the Superior part, which the Physicians call *Pinna* or *Helix*, infers not *Demembration* because it wrongs not the sense of Hearing. We have a Decision 22. June 1610. *Guthrie* against *Rynd* where the Justices refused to sustain *Demembration* inferred from cutting off a part of the LUGG or Ear, and remitted the Cause to be tried, as a common Ryot before the Sheriff of the Shire as the Judge Ordinarie.

Seventhly, The *Chin* is by all acknowledged to be no Member in the proper sense, because it performs no distinct Operation, and is only useful for decorating and adorning the Body. *Farin. dict. fragm. crim. part. 2. N. 565.* where he cites *Majol;* and (following the Canon Law) concludes that the Amputation of the *Chin* infers not irregularity against the Committer, and consequently no Crime of *Demembration* according to them: But every one grants, that to cut off the *Chin* is a Ryot, or *Delict*, severely punishable; because it creates a Deformity in the Face, and makes the Patient (though not the Agent) irregular.



- 45 Eighthly, The *Beard* is no *Member* ; Nevertheless to cut off, or to pluck out the Hairs of ones *Beard* without his Consent, even albeit no Blood follow is an Injury, according to *Oinot.* cited by *Zacchias Quest. medico-leg. lib. 5. tit. 3. q. 5. N. 14.* And there is good Reason why it should be punished; because the Ancients expressed their sadness by permitting the Beard to grow. *1. item quod labionem 15. §. generaliter 27. ver. Hac autem fere ff. de injuriis.* Divers Authors are cited by *Cujacius, lib. 6. observ. 5.* to prove this Custome and therefore *l. 39. dict. tit.* it was not permitted to any man *vestem sordidam Rei nomine, in publico habere, capillumve summittere, nisi ita conjunctus erat asinitate, ut invitatus, in Reum testimonium dicere cogi non possit.* Further, to cut ones *Beard* was a mark of indignity; and therefore *David* resented it, when it was done to his Ambassadors by *Hannun, King of the Ammonites 2 Sam. 10. 4. 5.* where its said that *David's* Messengers were ashamed. But albeit the *Beard* be no *Member*, yet, this cutting it off, is punishable *pœna incidentis membrum*, according to *Baldus, in l. Reos. C. de accusat. N. 6. &* from this *Baldus* concludes the *Beard* to be a *Member* in the proper Sense, but others in the general Sense only as the extremities of the Nails of the Fingers are Members which we daily cut off. *Guazzin. de defensione Reorum. def. 33. Cap. 6. N. 5.*
- 46 Ninethly, The *Papes*, or *Duggs* of a Woman, are *Members* in the proper sense; for their producing Milk and giving Suck is a distinct Operation; And therefore he who preclinds them becomes by the *Canon Law*, irregular, and consequently a *Demembrator*, according to our former Rule. *N. 22.* of arguing from irregularity to *Demembration* against the *Committer* of the Crime. of this Opinion are *Farin. dict. fragm. crim. part. 2. N. 593. Baldus, in l. data opera. N. 75. C. qui accusi non poss. Suarez. disp. 44. sect. 2. num. 9. fin. verj. solet dubitari*, with divers others cited by *Farinacius.*
- 47 Tenthly, It may be controverted, if the *Spondyls* be proper *Members*, or not. They are called in Greek *σπονδυλαί* in Latine *Vertebrae* ; because by their help, the Body turns. They are in Number 29. whereof 7. in the Neck; 12. in the Back ; 5. in the Loins ; and 5. in the *os sacro* ; as the *Anatomists* reckon. *Vid. Castelli Lexic. ad Verbum, Spondylus.* The Reason of the Doubt is, that none of the above-mentioned Authors have counted them among the proper *Members* : And yet on the other part they performe a distinct Operation, because by them, several places of the Body are turned. By our practise they have been found to be proper *Members* ; for the *Justices 7 Nov. 1621.* found a *Lybel of Mutilation*, alledged to be committed by *Marion Paton* upon *Williamson* her Apprentise, by dislocating the *Spondyls* of his Back, relevant to infer the Crime and pain of *Mutilation*, and remitted the *Lybel* to the knowledge of an Inquest ; but no Decision followed, because she proved that the Pursuer recovered. Now if from hence you will not allow the *Spondyls* to answer to the precise and exact Definition of *Members* in a proper sense, then you must grant, that the *Justices* sometimes make use of the Power which they have, according to the Concessions of *Zacchias dict. quest. medico-legal. dict. lib. 5. qu. 4. N. 27. and 31.* where he says, that Lawyers are not tyed to the precise Definition which Physicians give of a *Member*.
- 48 Eleventhly, *Castratio virilium* is one of the most atrocious *Demembrations*; and when a man does it to himself, he is *sui homicida. C. 4: dist. 55.* And so punishable with Death and Confiscation of Goods, *l. 4. §: 2 ad leg. Cornet: de sicar:* And its equivalent if one suffered himself willingly to be castrated by another ; *dict. §. Farin. fragm. crim. part. 2. N. 584.* and the *D D.* cited by him. *Hac castratio fit, vel præcisione virilium, vel faciendo Spadones, thlibias, thlasios;* *dict. §. 2,* As to all the Species and Punishments of this Crime, *vid. novel. 142. de his qui Eunuchos faciunt. & novel: leonis 60.* See also *Cowar: init. prim. par. relect. de homicid. N. 6.* where he adduces many Texts and Reasons to prove that

that it was unlawfull for any man *seipsum castrare prætextu Religionis, vel volenter id pati ab aliis sibi fieri.* And therefore *Eusebius* is justly reprobable for defending *Origin* upon that account. The common Reason is, that *nemo membrorum suorum est Dominus.* l. 13. *ad legem Aquiliam.* whether this Crime may be punished *pœna talionis* will occur to be spoke of afterwards, upon the Question, how far the Law of *Retaliation* is yet in Force.

Twelvthly, I come now to speak of the *Hand*, which in a large Sense is taken for the whole *Arme*, but more particularly for that *qui cubito annexitur*; <sup>49</sup> and 1. includes, the *Carpus* or *Wrest*, or first part of the *Palm* of the *Hand*; or that part of the *Arme*, which is betwixt the lowermost part of the *Cubit* and the *Hand*, and consists of eight small Bones, with which the *Cubit* is joyned to the *Hand*: 2. It includes the *Metacarpus* or *Metacarpium*, or back of the *Hand*, made of four oblong little Bones, which expand the *Palm* of the *Hand*, called *postbrachialia*. 3. it includes the *Digiti* or *Fingers* joyned to the *Metacarpus*; the outmost Bounds whereof are called *Metacarthodili*. It is called a Member. *Novel. 134. cap. 13.*

We need not insist to prove that the *Hand* thus composed is a Member in the proper sense, and that it has a distinct Operation, this is not only confessed <sup>50</sup> by all, but to the end that *Amputation* of the *Hand* may be the more abhor'd and severely punished, the Doctors of Law and Medicine have condescended on it's several Uses. *viz.* By the *Hand* one defends himself from the Cruelty of Man and Beast; by it he rules and commands Beasts to be subject to him, even such as are of the wildest Nature; it serves to many uses for his Body; and is useful to the very Beasts that serve him; and being stretched forward it supplies the want of the Eyes, by preventing of several Dangers; and by signs, it many times supplies the want of the Tongue. These are collected out of *Cæsar. Rodig. lib. 4. lict. antiq. Cap. 3. Galen. lib. 1. de usu partium cap. 3. & lib. 11. Arist. 4. de part. anim. Cap. 10. Cicer. lib. 2. de nat. Deor. Fortunat. Fidel. lib. 2. relat. med. §. 4. Cap. 1.* Therefore the Justices have always found *Demembration* to be incurred by the cutting off of the *Hand*, and *Mutilation* by the hurting thereof to that Degree that it became useles. 5. May 1605. *Skirven* against *Forrester*, for mutilating him of the *Hand*. 26. Nov. 1613. *John Hunter Taylor* against *Menzies* of *Castlehill*, who came in the Kings Will, and was fyn'd in 100. lib. Scots. and 30. July 1614. *Donaldson* against *Lorimer*. And 10. July 1635. *Thomson* and her Spouse against *Gillespie, Thomson* and others. The like 24. July 1635. *Fletcher* of *Benshaw* against *Ramsay, Lindsay* and Lord *Spyney*, for Mutilating him of the Left-hand: I should not need to cite Decisions in so clear a Matter, were it not the Custom.

Thirteenthly, There is as little Doubt, that the *Leg* is a proper Member, and that it has its distinct use profitable to the Body, and which can be best judged by such as want it. We have the following Decisions. *viz.* 6. June 1627. *Lesly* against *Harvie* for Mutilating his left Leg. 20. July 1627. *Patterson* against *Wordie* for Mutilating his right Leg. And in the foresaid case, 3. Novem. 1621. *Williamson* against *Paton* for shortning one of his Legs by wounding thereof. and the like was pursued 28. July 1647. *Forbes* of *Lesly* against the Laird of *Pitfoddels* for mutilating one of his Legs by the Shot of a Pistol; in which *pœna talionis* was lybelled, but it came to no Decision: As also 11. March 1631. above-cited, *Crawford* against *Scot*; where the Justices sustained *Mutilation* for Scots breaking of *Crawfurds* Leg in Wrestling, and remitted it to the knowledge of an Assise, whereby he was convicted and fined in 250. Merks. The like 19. March 1690. *Relist* and Children of *Fenton* against *Montgomery* for breaking of *Fentons* Leg; where the Lords Commissioners of Justiciary found the Lybel, as founded upon Presumptions, relevant

to infer an Arbitrary punishment, and fyned him in 2500. *Merks.* This case is as plain as that of the Hand, and therefore Decisions are only cited for Custome.

- 52 Fourteenthly, The greatest Difficulty is about the Fingers and Toes, whether they are Members *per se*, or only parts of the Hands and Feet. The D D. are divided in their Opinions; most of them are for the Negative, but some are for the Affirmative. Others distinguish betwixt the cutting off or Mutilating the whole, and a part only.
- 53 For the Negative simply, *viz.* That the *Fingers* are no Members, we have these Lawyers *Bartolus ad l. 14. ff. de statu. & in l. 2. de pub. jud. N. 13.* Where he says expressly *digitus non est membrum, sed pars Membri*, and if there were a Statute ordaining Amputation of a Member to be punished *lege talionis*, it would not be extended to the Amputation of a Finger. And *Baldus in dict. leg.* says, *digitus non est membrum sed pars officialis membri*, and that, *aliud est dividere in membra, & aliud in frusta, & sic amputans digitum non dicitur amputare membrum*; and again, *Digitus est tantum membrum in diminutivo, non membrum proprie & principaliter, quia non est aliquota pars corporis sed aliquanta particula respectu qualitatis*, and compares it to a Tree of the Roof and a stone in the Wall of a House, which are but parts of the Roof and Wall, and not Members of the House. And with these agree *Decius in l. si fugitivi C. de servis fugit N. 26. Julius Clarus. Farin. frag. crim. part. 2. N. 587. Pannormitan. in Cap. Cum illorum. 32. de sent. excommunic.* As also *Covarr. part. 3. relect. in clement. Si furiosus de Homicid. N. 8. vers. incip. tertio.* Where he cites not only *Bartol.* & *Bald.* but *Felin. Anton. R. Chassaneus* and others. With them likewise agree *Cabal. dict. cent. 3. resol. 236. N. 11. 110. and 118.* Where besides these above cited, he cites *Cæpol. Angel. Castr. August. &c.* But although *Caballus dict. cas. 236.* has affirmed that *digitus non est membrum*, yet in *eod. cas. N. 109. 110. 111. & seqq.* he is forced to grant that if the hand be debilitated [meaning Mutilated] by Percussion of a Finger, one, two or three, that then *percussor tenetur de membro debilitato*; and says, he has often seen it so decided, and that he himself hath frequently decided so. Among the Physicians we find the above-cited *Zacch. dict. lib. 5. tit. 3. qu. 7. N. 12.* and the foresaid *Fortunat. fidel. derelat. med. lib. 2. §. 5. Cap. 2.* also for the Negative.
- 54 *Suarez. dict. disp. 44. de cens. Sect. 2. N. 6.* to establish a Rule for judging irregularity, seems to agree with the former D D. for there he says *Cui altera manus deest dicitur simpliciter mutilatus.* Whereas, in *cap. 2. de clerico agrot. presbyter, cui media palma manus cum duobus digitis abscissa fuerat, non dicitur truncatus membro, sed accepisse membri debilitatem & deformitatem; ergo proprie membrum solum est tota manus.*
- 55 But on the other side, there want not learned men, who affirm the Finger to be a Member, as *Cajetan. 2. 2. qu. 65. art. 1. and Sol. lib. 5. de justitia q. 2. a. 1. &* to prove it say, that it is not necessary to the Essence of a Member, in order to Mutilation [meaning Demembration], and irregularity, that it exerce a distinct Office and Action; but it's sufficient that it co-operat with a principal Member, and be assistant to it in its proper Actions; and subsume, that a *Finger*, although it cannot operat by it self without concurrence of the Hand, yet often it has something proper to it in the Action of the *Hand*, as in playing on a musical Instrument, in Writing, and the like; And if it were otherwise, then one Man should not be irregular, by cutting off anothers *Finger*, which is false, because by so doing, he much diminishes the integrity of the Body; And *Cajetan.* further says, that every organical Part which makes up the integral Body, is a Member in Order to Mutilation; and *Fingers* are such organical parts. Moreover, he says, all that is said of Mem-  
bers



bers agree very well with parts of principal Members; and that there is no repugnancy between being a Member and the part of a Member, [meaning in order to Demembration.] And that the Gloss. in *C. cum illorum*; 32. de sent. excom. verb. *Mutilationem membri*; insinuates the same, saying in the like case, we must not distinguish between a Member and a Member.

Suarez. *diff. disp.* N. 8. having related the Opinions of Cajetan. and Soto, steps in as a Reconciler, and approves their Opinion, in so far as concerns irregularity, and says, that the Physical Question, viz. what is a Member? and the Juridical, what is to be understood by a Member in penal Laws? do not at all concern the Case of Irregularity, which contents it self with a simple Mutilation, though it be not the Mutilation of a Member in the proper sense according to the forecited Clementine, and then affirms Mutilation [meaning Demembration] simply taken, is committed, when a principal Member is remarkably diminished, albeit not totally prescinded according to the Notion and Propriety of the Latine Word: and if at any time the Canons make mention of a Member; they always intimate that any Diminution is sufficient; and for this cites, *Cap. de cleric. pugnant. in duel. Ibi vel Membrorum diminutio.* And Felin. in cap. cum illorum de sentent. excom. N. 3. Farther the same Suarez. N. 9. *Ibid. in med.* distinguishes, and says that Abcission of one Finger is not commonly sustained sufficient, which, says he, is true if it be one of the two least Fingers; but if any other Finger be cut off, it is a sufficient Diminution, at least doubtfull.

The Reason why I have insisted so long on this Question, *And digitus sit Membrum?* is, because I find it often debated in the criminal Registers upon the Authority of the DD. And now having shown their Opinions; I come to our Decisions on this Point: viz. a Lybel of Demembration was sustained for cutting off the Thumb of the left hand & three Fingers; 3. Nov. 1620. *Allan* against *Stewart*. Mutilation was also sustained when committed on the two foremost or first and second Fingers; 15. July 1642. *Laurence Cheyne* Brother to *Wallie* against *Mowat* and *Newings*. And for mutilating of three Fingers; 5. Novem. 1618. *Dalglish* against *Walter Scot*. And again a Lybel of Demembration was sustained for Amputation of three Fingers of the left hand; 14. September 1610. *Montgomery* against *Henderson*. And for the Amputation of two Fingers; 17. Dec. 1623. *Boyne* against *Hately*. And for the Amputation of two Fingers of the left Hand, 19. Novem. 1647. *Inglis* of *Craigmakerran* against *Martine*. And for the Amputation of the Thumb of the left hand 18. and 27. of June 1605 *Brown* against *Johnstoun*. and 12. of January 1642. *Taylor* against *Norie*. and 15. July 1642. fore said, Mr. *Patrick Cheyne* of *Wallie* against *Mowat* and *Newings*. For Amputation of the Finger next the little Finger commonly called the Ring-Finger or *Annularis*; 8. March 1605. *Fowler* against *Lermont*. For Amputation of the Little-Finger of the Right-Hand, 27. Feb. 1618. by biting it off with his Teeth; *Thomson* against *Miln*; which is a greater length than Suarez. allows, who expressly excepts the Little Finger, and says that the Crime of Demembration is not committed by the Amputation thereof; *vid. num* 56. *supra*. In five of these Decisions, viz. *Allan* against *Stewart*, *Montgomery* against *Henderson*; *Dalglish* against *Scot*; *Inglis* against *Martin*; and *Boyne* against *Hately*; The Defence that *Digitus non est Membrum* was propon'd and repell'd, notwithstanding of the Authority of *Bartolus*, *Baldus*, *Julius Clarus* and others, was urged; and the Reason of the repelling was in respect of dayly Practice: So that there remains no more doubt, with us, on that Question, whether the Finger be a Member in the proper sense, or not.

- 58 And certainly, the Decisions are very just and reasonable; Because the Hand discharges no Operation but by the *Fingers*; Further, if the *Fingers* be separated from it, it is of little or no use: And if the *Fingers* be distinctly considered, it will be found that each of them has it's own use. For, in the *Thumb* lyes the Strength of the whole *Hand*, and therefore is called *Pollex*, *quia aequè pollet omnibus digitis*; also *artix*<sup>sup</sup>, because it is placed against the other *Fingers*, as if it were a *second Hand*; and is sometimes called, *parva manus*; by it we Write, Paint, &c. and it hath the chief use almost in all Actions: And if the *Pollex* or *Thumb*, with the *Index* or *Forefinger*, be both cut off, the whole hand is almost lost; for the three Remaining, viz. *Medius*, *annularis* & *minimus*, do rather co-operat with the *Pollex* and *Index*, than work by themselves, for of themselves they can do little to purpose, except in playing on Musical Instruments; their several uses, are best known by a mans Employment; and according to that, the Judge should consider the Punishment: as we shall prove afterwards.
- 59 The Consideration of the Use of the *Fingers* to the *Hand*, hath mov'd some of the D D. ( who deny them to be distinct Members, yet ) to acknowledge that *Mutilation* and *Demembration* may be committed upon them. but then when the *Fingers* are pre-scinded or mutilated, they think it should be said the *Hand* is demembred or mutilated: and not the *Fingers*, which, say they, are but Instruments of the *Hand* co-operating with it; and this seems to be the Meaning of *Suarez. dict. disp. sect. 2. N. 9.* And are the express words of *Fortunat. Fid. lib. 2: relat: med: sect. 5: c: 2. Mutilam particulam* (inquit) *nuncupare solet Galenus, non quæ jam est abscissa, sed quæ jam superest imperfecta. de morb: caus. 8.* where he cites *Galens* own words, *nemo ambigit quod ejus quod superest partis est agritudo.* and so the whole Difficulty is resolved in a Question about a Form of Speaking, whether, when the *Fingers* are cut off. it be more proper to say the *Fingers* are demembred, or the *Hand* is demembred of the *Fingers*.
- 60 It's a wonder why the D D. should make so much work about this Question, when as the Laws they found on, give little, or no ground, for their Opinion. For, as to l: 14: ff: de Statu. The Scope of it, according to *Corasus*, is not to determine what is a *Member*, and what not, but to regulat Succession *ab intestato*, and to exclude from that Succession all Monsters and prodigious Births. *qui contra formam humani generis converso more procreantur*; as when a Woman brought forth a Calf or Monster with two Heads, whereof many were brought forth at that time, among the *Romans*. As to these *Paulus* the Author of the Law determines, they should not be numbered among Children: But if the Birth was not monstrous, *sed tantum membrorum humanorum officia ampliavit*; ex. gr. had six *Fingers*; such a Birth might be numbered among Children, and have the benefit of Succession: And therefore the said Text, as it's explained, affords no ground for proving that *Digitus non est membrum*. And l. 2. ff. de pub. jud. and l. si servi. Cod. de servis fugit. speak not one word of *Members*. And the truth is, the matter of *Canonical irregularity* occasioned the most part of the Debate.
- 61 Having said so much upon the *digiti manus*, or *Fingers*, because we find it often debated in the Criminal Registers; it remains now that we speak something of the *digiti pedis* or *Toes*; As to which we have no Decisions in these Registers, but yet there is the same Reason to conclude, that the Crimes of *Mutilation* and *Demembration* may be inferred, when the like Violence is committed on *them*, that serves to constitute these Crimes as to the *Fingers*, because they are also of great use; for if they be cut off, a man can neither stand nor walk, as before, though he may in some measure do both; nor

nor to put his Body in such a Posture, as to be able to defend himself against the Assaults of his Enemies; nor to make his escape, when like to be overpowered. If only one Toe be cut off the inconvenience is not so great as arises to the Hand, by the loss of a Finger; yet the *Foot* hath a great loss by the want of the *Great-Toe*, and the Damage more than in the loss of any other; and next to that, is the Damage of the *Toe* next to it; and so in order, both as to *Fingers* and *Toes*; but still the loss of *Fingers* is esteemed greater, because they performe more Actions, and the hand is so noble a *Member* that when a *Member* is simply spoke of; the *Hand* is understood. *Zacch. Quest. medico-legal. lib:5: tit.3.q. 6.N.5.* and the Authors there cited by him.

And yet if we may give credit to the Authors cited by *Zacch. dict. q. 6. N. 9.* we'll find that some men, born without *Hands*, have performed the like Actions with the *Toes*, as the Hand is in use to do. He cites *Alex. Benedict. Paree*, the famous *French* Chirurgion, and divers others; making mention of persons, who Ate, Drank, played at Cards and other Games with their *Toes*; and of one that Stole, Rob'd, murdered with them, and suffered Death for so doing; and of a Woman that cut Cloath, Span, Sewed, &c. *Zacch. says, anno 1624.* he saw *Petrus Lucernensis* who wanting his Armes played on all musical Instruments with his *Toes*; and a Woman who anno 1627. performed the like Actions. If any desire to please himself with Examples of this Nature, he may peruse *Cardan. de subtil. & lib. 12. de variet. cap. 62.* as also *Schenckii. Hist. memorab. Monstrorum;* and *Wanely* in his *wonders of the little world. lib. 1. cap: 10. N. 3. & 6.* We only mention these to this end to show that if such persons should exist among us and be mutilated or Demembred of *Feet* or *Toes*, the Crimes would deserve equal punishment as in the case of *Hands* or *Fingers*, because the prejudice is equal, except as to Deformity, which is more visible in the hands.

Its questioned among the D D. if Precision of a withred Member infers the Crime and Punishment of Demembration? *Suarez: de censur. disp. 44. Sect. 2. N. 11. vers. Respondeo aliud esse. & versu. ideoque si alter postea.* And *Farin. Fragm. crim. part. 2. N. 597.* handle the same point (as to Irregularity) and conclude that he that detruncats a withred Member from his Neighbours Body, becomes no more Irregular by so doing, than if he had cut off the Member of a dead man; because the Member wanted Life in the one case as well as the other; but if the Member cut off had been a living (though a weak & wounded Member, the Detruncator (say they) had become Irregular; but notwithstanding of what they conclude as to Irregularity (the causes whereof they labour to retrench, as I have said) yet such a Detruncation infers the Crime and punishment of Demembration, when the Question is concerning Punishment, and not Irregularity, and this is the express Opinion of *Caballus, resol. crim. cent. 3. Cas. 232. N: 77. & 78.* where he affirms, that albeit a Member want life, yet so long as it adheres to the Body, it's still a Member; as a withred Tree is always a Tree, so long as it stands on the Root; but after separation it's not called a Tree, but Wood: And for this he cites *Angel. Salicet. Fulgos. and Capol.* To this add, that if a Malefactor be sentenced to have a Hand cut off indefinitely, it is always understood of his withred hand, if he have one: per *Authent. sed novo jure. C. de serv. fugit. & ibi gloss. 2. in adit.* which could not be, if it were no Hand. This is also concluded by the said *Cabal. dict. cas. N. 52. Jul. Clarus in pract. §. fin. q: 69. N. 4. Capol. in dict. Authent. N. 24. Carpz. pract. Crim. p. 1. qu. 40. N. 43:* and divers others.

The next Question is, if a man may be punished as a Demembrator, who cut off a Member of a dead mans Body out of a design to disgrace it? *Farin: loc:*



*Farin. loc. supra cit. N. 359.* says it infers no *Iraegularity*; so says *Covarruv. in Clem. si furiosus. p.2. in prin. N. 1. de homicid.* because the Member being dead, is no Member, or, rather, I say, because the separated Member was not cut off a living Body, as in the case immediately preceeding. *Majol. (cited by Farin. N. 600. ibid.)* and some others affirme the contrary, because if the person had been alive, the Delinquents malice would have led him to do the same; and *voluntas non actus, spectanda est. l. 1. §. 8. ff. de sicar.* Yet for all that I think the Crime of Demembration cannot be hence inferr'd being Homicide could not be inferred by a wound in the Heart, which would have killed him had he been alive. *vid: Suarez. de cens. disp. 44. Scit. 2. N. 3. ad fin. vers. atque ita & N. 4. Farin. loco citat. N. 601.*

65 The use of all this Discourse, concerning proper and improper Members, is for understanding general Statutes concerning Members, without mentioning whether they are proper or Improper; For Example, if a Law or Statute Ordain, that one who cuts off, Mutilats or Debilitats a Member, shall be punished: that will not reach him, who cuts off, Mutilats, or Debilitats an improper Member. *Cabal. dict. Cent. 3. cas. 236. N. 16. 17*; unless says he, the contrary appear from the mind of the Statute, as if it run against him, who cuts off or debilitats ANY Member; in that case, says he, it would comprehend improper Members; because the Relative ANY, or ALIQUOD is general: and for this he cites *Bald. Fulgos. Castr. Capol. Angel. August.* And the like is asserted by *Bartolus, ad l. non sunt liberi. 14. ff. de Statu. viz.* That if there were a Law ordaining him that cutts off a Member; to be punished *panâ talionis*; it would not reach him who cuts off an improper Member; and *Pannormitan. C. cum illorum. 32. de sen. excommun.* follows *Bartolus*; and it doth not alter the case, whether the punishment appointed by the Statute, be Corporal, or arbitrary: the thing remarkable being only the generality of the Word Member.

66 All Judges competent in Homicide, are likewise competent in the Crimes of Mutilation and Demembration, and therefore not only are the Justices competent, but likewise Baillies of Regalities, Stewarts of Stewartries, and the Commissioners of the Borders. But sometimes where the Pursuit was first commenced before the Justices, they have refused to allow Repledgiation, as in the forecited case, 15. July 1642. *Chynie of Wallie* against *Monat and Nevings*, where the Justices did not allow Sir *William Dick Stuart* of *Orkney* (the place where they dwelt) to repledge, but recommended to him to agree the parties, and because he did not agree them, the Justices judged the Cause *ut supra*. The Justices allowe the Commissioners of the Borders to repledge; and so 11 June 1612. Lord *Cranston* repledged *Rutherford* pursued by *Weir*, for mutilating him of the foremost Finger of his left Hand; and yet the Justices did not admit of that Repledgiation till they had advised with the Privy Council.

67 Barons of Baronry are not competent Judges of Mutilation and Demembration; and therefore there being a Pursuit moved before the Justices, 10. July 1635. *Thomson* against *Gillespie* and others, for mutilating her of her right Hand, when she came to rid them; and they craving to be absolved, because the Laird of *Killhead*, as Baron Baillie to the Lord *Drumlanrig*, had judged the Cause; The Justices repelled the same, and remitted the Pannals to the knowledge of an Affize. Neither is the Privy Council Judge to these Crimes, more than to Murder; And hence it followeth, that if he who is guilty should be conveyened before the Privy Council, to be punished for that Crime as a Ryt; their Sentence would not hinder the Justices to judge it over again under the head of Mutilation and Demembration. 27. June 1605. *Johnston* against *Brown*, and 9. and 11. January 1628. *McMurrans* against *Hamilton*

ton; where the case of *Johnston* against *Maxwel* of *Grubtown* Anno 1605. for assaulting the House of *Newbie*, was cited; but the *Justices* only continued the *Dyet*, because *Hamilton* the Pannel, was sick.

But though the *Privy Council* cannot decide cases of *Mutilation* and *De-* 68  
*membration*; yet they can precognosce and discharge the *Justices* to proceed; for this they can do in *Homicide* which is the greater Crime, and there needs no Proof of this, because it's daily practised.

There are some *Cautions* to be observed in forming a *Libel* of *Mutilation*; 69  
as first, Albeit it be sufficient in the case of *Homicide*, to libel that the Defunct was killed, *ex:gr.* on the first day of *January* 1698. or on one or other of the days of the said Month, or Months of the said year, yet in a *Libel* of *Mutilation*, the Day must be precisely condescended on, or declared at the Bar, which is equivalent. 10. *January* 1640. *Ker* against *Halyburton*; and the alternative [ upon one or other of the Days of the said Month, or Months of the said Year ] will not be sufficient; because the Pursuer cannot insist within Year and Day after the committing of the Crime; in respect the Law allows that time, to expect recovery of the Wound; as we shall prove in the first *Defence*.

secondly, It will be convenient that in a *Libel* of *Mutilation*, *ex:gr.* of the *Eye*, the true matter of Fact by which the Sight was taken away be condescended on, and so in the foresaid Action 28. *July* 1643. *Logie* against *Howison*, the *Libel* bears, that the *Eye* was mutilated by a Stroke with a Tree on the Head; which brought a Defluction on the *Eye*, and occasioned a *Blindness*. If the *Libel* be so formed, it will the better quadrat with the *Probation*, and prevent all Cavillation, which may occur by reason of Difference that may happen between the Tenor of the *Libel* and *Probation*. I say it will prevent Cavillation; but I say not, that a *Libel* without this Condescendence will be rejected as irrelevant; for the contrary was found. 19 Nov. 1647, *Inglis* of *Craig-muker* en against *Martin*; where the *Justices* found a *Libel* of *Mutilation* relevant without such a condescendence, notwithstanding it was urg'd that *Mutilation* falls no otherwise under the external sense, but by virtue of the Incisions or other Hurts from which it's inferred. But there will be greater difficulty in a *Libel* of *Demembration*, *ex:gr.* of a *Leg*; which was not cut off by the stroke or wound, but was crushed to that Degree, that the *Chirurgion* was necessitated to cut it off; for if the true matter of Fact be not libelled; but, in place thereof, it be said, that the Pannel cut off the *Leg*; then the Pannel will simply deny the *Lybel*, and consent it be found relevant, as conceived; and then when the Witnesses come to be examined, a Debate will arise upon the Interrogatories, for either they must be agreeable to the *Lybel*, or to the Matter of Fact: If to the *Lybel*, *viz.* whether they knew, that the Pannel cut off the *Leg*? they will depone negative; and if to the Matter of Fact, *viz.* if the *Chirurgion* cut it off, then it will be objected, that the Interrogatories are disconforme to the *Lybel*; and ought to be rejected; because the *Lybel* is found relevant as conceived; bearing that the Pannel cut off the *Leg*; whereas if the true Matter of Fact had been lybelled, *viz.* that the *Chirurgion* cut it off; the Pannel would have alledg'd and prov'd, that the *Chirurgion* did it *ex malo regimine*: Of which Defence he had no use as the *Lybel* was conceived: and so the Pannel being by the Conception of the *Lybel* depriv'd of that Defence, the Witnesses can only be examined upon the precise terms of the *Lybel*. And suppose the *Justices* do sustain the Interrogatories as they agree to the matter of Fact, *viz.* that the Pannel crushed the *Leg* and the *Chirurgion* cut it off, yet it may be after much Altercation, which may be preven'd by lybelling the true matter of Fact.

[ F 2 ]

Thirdly

Thirdly ; It will not be improper in a *Lybel* of *Mutilation*, to say, that the *Member* was not only rendered useles at the time by the Hurt it receav'd, but that it remains still useles, never having recover'd: just as in a *Lybel* of *Reduction* of a *Bond* or other deed granted on death bed, its usual to say, that the *Defunct* dyed of the Sicknels and never went to *Kirk* or *Mercat* after he granted the *Bond*; for by this negative ( which proves it self ) the burden of proving the Contrary, ( viz. that the *Member* did recover its strength ) is devolved on the *Pannel*.

Fourthly, If either *Mutilation* or *Demembration* be so secretly committed that no *Witness* saw it, and the *Probation* be only by *Presumptions*, it will be very convenient to condescend upon the *Presumptions*, in the *Lybel*, that the *Justices* may give *Interloquitor* upon the Relevancie of them, and leave nothing to the *Affize* but to cognosce upon the Fact of those *Presumptions*, because it is hard in many cases to judge upon the relevancy of *Presumptions*. This Caution was practised in the *Lybel* of *Demembration* at the instance of the *Relict & Children* of *William Fenton* against *Montgomery*, upon which the *Lords Commissioners of Justiciary* gave their *Interloquitor*, dated 19. March 1690. finding the *Presumptions* relevant to infer an arbitrary Punishment, and remitted the same [ *id est*, the matter of Fact of the *Presumptions* ] to the Knowledge of an *Affize*, whereas if the *Presumptions* had not been lybelled, but had been first adduced before the *Affize*, it's a thousand to one if they had not given a *Verdict*, finding the *Lybel* not proved, because it concluded pain of death, on the account that the breaking of *Fentons* Leg was the cause of his death; which the *Chirurgeons* would not depone. I find a *Libel* of *Homicid*, 12. April. 1637. had been formed after the same manner; at the instance of the *Kings Advocat* against *Memath*, for murdering a poor *Chapman* upon the Hill of *Corstorphine* where no witnesses were present and no other probation but presumptive.

Fifthly, there are some, both *Divines* and *Lawyers* who think it convenient in a *Lybel* of atrocious *Demembration* to conclude that the punishment of *Retaliation* may be corporally inflicted on the *Pannel*, ( as was done in the foresaid Pursuit, *Forbes* of *Leslie* against *Pitfoddels* ) to this end, that if either the *Pannel* be solvent, yet unwilling to pay what the Judge shall think fit to modify by way of *Affythment*: Or if he be *vilis persona*, or indigent: corporal punishment may be inflicted; In which last case the *Lawyers* say that *Paupertas facit poenam pecuniariam commutari in personalem*. *Caball. dict. cas.* 236. N. 43. & 45. and this *Cautela* doth likewise answer to the design of *cap. 11. stat. Rob. 2.*

70 I come now to the *Defences*; some whereof are *Dilatory* and serve only to continue or delay the *Dyet*; others are *peremptory* which elide the *Lybel*. Of the first kind are these.

71 1. It's a good Defence against a *Lybel* of *Mutilation* that year and day is not elaps'd, since the Time lybelled of committing the Crime, this the *Justices* will sustain and continue the *Dyet* till Year and Day elapse, because by our Custom, as aforesaid, so much time is allowed to expect recovery. So they found 17. Decem. 1624. *Boyne* against *Hately* and 10. January 1640. *Ker* against *Halyburton* and *Crawmond*. It was also propon'd 9. and 11. January 1628. *Mcmerrian* against *Hamilton*, and in the above-cited 3. August 1647. *Forbes* of *Lesly* against *Pitfoddels*; but none of these two came to a Decision. The reply to this ( if the Day of Committing be condescended on ) is; that though the *Lybel* be raised within year and day, yet it's not insisted on, till year and day be elapsed; or in case a certain day be lybelled with an Alternative [ of one other of the days of that Moneth or Moneths of the year ] then the Reply is, that suppose count be made from the last day of that year, it will be found to be expired.

This



This Defence, that year and day is not elapsed, takes no place against a 72  
Lybel of Demembration; because where a Member is cut off, recovery is not  
to be expected, as was found, 27. Feb. 1618. Thomson against Miln, for  
biting off her Finger.

If the Pursuit be both for Mutilation and Demembration, *ex. gra.* for mu- 73  
tilating two Fingers, and demembring the Hand of other two: the Pursuer  
may pass from the Mutilation, and insist within year and day for the De-  
membration; as was found in the foresaid case 17. Decem. 1622. Boyne against  
Hately, for demembring him of two Fingers and mutilating him of other  
two.

The second Dilatory Defence is, that the Case is submitted: and the Inter- 74  
loquitor in such a Debate is, to continue the Dyet, till the day of the Expira-  
tion of the Submission; which may be either condescended on, and insert in  
the Act of Continuation; or the Justices may put the Pannel under Cauti-  
on to answer on fifteen days warning, in case the Submission take no effect; 14.  
June 1626. Ord against Forbes; 15. June 1629. Paterson against Wordie;  
and 20. July 1627. inter eosdem: From these two dilatory, two peremptory  
Defences follow.

The first peremptory Defence is, that the mutilated Member is perfectly reco- 75  
vered; in so far as the Pursuer makes use thereof as he did formerly: and it  
will be fit to condescend upon the Deeds of Strength, which are the Evidences  
of Recovery. *Ex. gra.* against a Lybel of mutilating of the Hand of the Fingers,  
it was found relevant that the Pursuer had ridden up and down the Countrey, &  
held the Bridle with that Hand and Fingers; and that he cut up Poultrie and  
Geese at the Table, as he had been in use to do; 15. Dec. 1630. Barclay against  
Kennedy in Mayboll, where the Defence being prov'd, the Assize clean'd the  
Pannel; and the Justices only fin'd him in an hundred Merks of Expenses for  
the Cure. The like Defence was sustained in the foresaid Pursuit of Mutila-  
tion, 3. Novem. 1621. Williamson against Marion Paton residenter in Leith,  
for dislocating the Spondyls of his Back, and mutilating him of his Leg; in  
which Pursuit the Justices found this Defence relevant to elide the Lybel, that  
the Pursuer, being a young Boy, had in his usual Recreations with his Com-  
rads, run Races on the Links of Leith; as he was in use to do before he was  
hurt. As also 6. June 1627. Lesly against Harvie, for breaking, at least lame-  
ing and mutilating him of his left Leg; this Alledgiance was found relevant,  
that the Pursuer had walked from his House many Miles.

This Defence of Recovery, is only relevant against a Lybel for Mutilation; 76  
for, as hath been said, Members once prescinded cannot be recovered; But  
Gaspar Taliacotius, in his *Chirurgia nova de Narium, Aurium, Labiorumque de-  
fectu*, pretends to have discovered a new Art of repairing Noses *per incisionem  
cutis ex humero*. And Lanfrancus cited by P. Zacchias *quest. medico-leg. lib.  
5. tit. 3. q. 3. N. 3.* reports, that some had asserted that a Nose, which once  
lay prescinded in the owners hand, was thereafter restored to it's place; but  
he calls it an impudent Falshood. Yet Zacchias *dict. q. N. 1. and 4.* fol-  
lowes Taliacotius; and cites Paree, and other famous Chirurgeons asserting the  
same, and thinks this maybe usefull to Lawyers, for discussing cases of De-  
membration. But seeing these learned Physicians do not agree about it, I re-  
mit the case to be class'd *inter ea, quæ raro & ex inopinato accidunt*; Like the  
*partus quinquagenaria*, in *l. si major 12. C. de legitim. Hæred.* and like Sera-  
pia's Birth of five Children; in *l. utrum. 7. ff. de reb. dub.* which last, Aristotle  
judg'd to be as impossible, *ut in l. 36. ff. de solut.* as Lanfrancus did the  
restoring of the Nose; and seeing, if it exist, we cannot expect express Law to  
decide anent it, (because Laws are only made for things *quæ u: plurimum, &  
non quæ raro eveniunt*, *l. 3. 4. 5. ff. de legib.*) it must be then regulated  
(when it happens) by paritie of Reason, with cases commonly existing, ac-

according to *l. 10. 11. 12. 13. ff. eod.* And by the same Rule, the Judge may decide in the Amputation of the Toes of persons, formerly mentioned, *N. 62.* who use them instead of Fingers.

77 The second *peremptory* Defence is, that the case being submitted, the Arbiters have decerned, and the Pannel is willing to fulfill the Decreet, or has already done it and obtained a *Discharge*; or that the Parties have *transacted* and agreed; this I say is relevant; for all Injuries become extinct by *Pactio* or *Transactio* *l. si tibi. 17. §. 1. l. si unus 27. §. pacta 4. D. de pact. l. non solum 11. §. 1. D. de injur.* and was so found by the Justices 14. *June 1637 Allardice* against *Forbes* for mutilateing him of his left Leg. In all these cases the Justices desert the Dyer, which is the proper terme of the Sentence proceeding upon *Transactions*.

78 The Justices do oftentimes recommend to the Parties to submit, so they did in the foresaid case 15. *July 1642. Cheyne* of *Wallie* and his Brother against *Monat* and *Neivings*, where *Sir William Dick Stewart* of *Orkney* compearing to repledge, the Justices recommended to him to agree the parties. Sometimes a judicial Submission is made to the Lords themselves, as was done 1. *Feb. 1650.* by *McLure* and *Baxters*.

Whence observe that the Crime of *Mutilation* and *Demembration* are but *privata delicta*; whereanent Judges are not oblig'd to inquire. *dist. §. 4. ff. de pact. 14: init. vers. Et in ceteris: ff. eod.* and may be inquired in.

A third *peremptory* Defence is, that the King has remitted the Crime, & ordered an *Assythment*; & the Pannel has found, or is willing to find *Caution* to pay the same as shall be modified; or that its already modified & consign'd: which Defence, as its usual against *Homicide*, so, is expressly sustained to fill the Pursuit of *Demembration* 17. *May 1610. Rob. Keith* against *Lindsay*.

81 Fourthly, *Diffimulation* (which is a tacit *Discharge* inferred from a friendly converse and Acts of Kindness) is a good *peremptory* Defence. *§. ult. Inst. de injur. l. si tibi. de liber. caus.* But it must evidently appear that there is a design to pass from the Pursuit; and therefore in the foresaid case, 12. *January 1642. Taylor* against *Norrie* for mutilating of his *Thumb*; the Justices found that the Pursuers consenting to let the Pannel out of Prison and drinking with him, were no such Acts of *Diffimulation*; but perhaps there were some Specialities in the case: as that they convers'd and drank together for respect to the Company; and the letting out of Prison might be in order to meet for communing about an Agreement. But abstracting from these or the like Circumstances, friendly conversing & drinking together, is a strong Presumption of passing from the Crime, according to *Mathaus; Apud Germanos* (says he *dist. tit. N. 14. propinatio poculi validissimum dissimulata injuria argumentum est.*

82 Fifthly, *res judicata* is an uncontroverted Defence; the Tryal being before the Justices who are the Judges competent: But (as I said before, *N. 67.*) neither is the *Privy Council* nor any *Barron-Court* Judge competent. *Act. 6. Parl. 16. Ja. 6.* And therefore their Decrees will not serve for an *Absolvitor*; but if the Pursuer passes from the *Mutilation*, and insists for *Blooding* or *Wounding* only; *res judicata* before the *Privy Council* or an inferior Court, is sufficient; and if it be the *Sheriff's* Decreet, and a Reduction of it raised, and a Reply upon the Reduction; the Justices will continue the Process for a time, till the event of the Reduction be known. So they did, 19. *Nov. 1649. Inglis* of *Craigmakerran* against *Martin*.

83 Sixthly, Its a good Defence that the *Privy Council* hath precognosced, found the Pannel innocent, and discharged the Justices to proceed. This is dayly practice and needs no Confirmation; as was said, *N. 68. supra.*

Some-

Sometimes the *Council* remit to the *Justices* to precognosce, so they did 30. <sup>84</sup>  
 July 1614. in a Precognition craved by *Donaldson* against *Ronald Lorimer*  
 and other three persons, for demembring him of the Left Hand; and the  
*Justices* not being able to discover any thing, because the Fact was done in the  
 Night, they remitted it to the *Affize*, who neither would fyle nor cleanse the  
*Pannels*, whereupon the *Justices* committed *Lorimer* to Prison, till they should  
 advise with the *Council*, and then 16. *Novemb.* that same year, after advising  
 with the *Council*, they pronounced Doom, that *Lorimer* should find Caution  
 to satisfie *Donaldson* as the *Council* had ordained.

Seventhly, The alledgeance of Self-Defence is relevant here, as in *Homicide*; <sup>85</sup>  
 and therefore as a Man may kill, in defence of his Person, his Wife, or her  
 Honour. l. i. §. 4. ff. ad l. *Cornel. de Sicar.* so much more may he mutilat or  
 demember such an Invader: As was sustained 27. *June* 1605. *Brown* against  
*Johnston*, in which case *Brown* was mutilated in assaulting *Johnstons* House in  
 the Night-time, with an Intention to abuse his Wife; and yet had the con-  
 fidence to pursue for the Mutilation; whereas if *Johnston* had pursued *Brown*,  
 then certainly *Brown* had been hanged; for 20. *Feb.* 1650. *William Macrie* Sould-  
 dier, was convicted and hanged, for invading *Colemans* House on the like  
 wicked Design. Also a Man may kill or mutilat in defence of his Goods,  
*Covarruv. de homicid. relect.* 3. sect. *Unic. N. 6.* where he adduces many Texts  
 of Law. As also a Man may Kill or Mutilat a Robber in the recovery of  
 Stolen Goods, when he is flying with them. *Act* 100. *Parl.* 11. *Jan.* 6.

If a Man defend himself against one who is authorized by lawful Autho- <sup>86</sup>  
 rity to apprehend him, that will not be esteemed Self-Defence, nor will he  
 that mutilats in the apprehending be accounted a Mutilator. This was found  
 anent the re-taking of a Souldier, who had run away from his Colours, and  
 being pursued, drew his Sword and resisted, and was mutilated in the Re-  
 sistance. 2. *Decemb.* 1641. *Jarden* against *Edmonston*. And just so will it be  
 in the case of *Messengers*, in their lawful executing of *Captions*. See our Au-  
 thor *Tit.* 11. of *Murder. N. 13.*

Eighthly, It's a good Defence that the Wound was curable, and that the Mu- <sup>87</sup>  
 tilation or Demembration was ex malo regimine. This holds in *Homicide*,  
 [ see our Author, *Tit.* 11. *N. 10.* and *Farin. de homicid. qu.* 127. p. 3. ] and  
 much more in lesser Crimes. But if the Chirurgeon was necessitated to cut  
 off the wounded Member, that will not excuse the Crime of Demembration;  
 it being all one to cut off the Member by a Stroke or to necessitat the Chirur-  
 geon to do it; per *l. nihil interest* 15. ff. *de sicar.* And so it was found in the  
 foresaid Action 27. *Feb.* 1618. *Thomson* against *Miln*, for biting off her lit-  
 tle Finger. But there may be some difference in the forme of lybelling the one  
 or the other; as, *N. 69: sect: 2: supra.*

Ninthly, If more than one be conven'd for Mutilation or Demembration, <sup>88</sup>  
 as *Actors*, *Airt* and *Part*, all of them may be insisted against, and it will be  
 no good Defence for any of the *Pannels*, that there is but one Wound which  
 could only be given by one as *principal percussor*, who ought to be condescen-  
 ded on, and first discussed. This was expressly propon'd for three Defenders,  
 and repelled, in respect *Airt* and *Part* was libelled, 10. *July* 1635. *Besje*  
*Thomson* and her Spouse against *Gilespie*, *Thomson* and *Hill*, for mutilating  
 her of her right Hand when she came to rid them, they being all fighting to-  
 gether: all three of them were remitted to the knowledge of an *Affize*. The  
 like 24. *July* 1635. *Fletcher* of *Benshaw* against *Ramsay*, *Lindsay* and the Lord  
*Spinie*, in which Action the Lord *Spinie* compar'd and took the Fact on him  
 and alledged that he was fyned by the Baillie of the Regality of *St. Andrews*,  
 and yer it was repelled in respect of *Airt* and *Part*. And in the foresaid Action  
 15. *July* 1642. and 5. *August* 1642. *Cheinie* and his Brother against *Mowat*  
 and the two *Neivings* for mutilating them: all the three Defenders were



convicted and fined in 1000. *lib.* to the parties, and two hundred pounds to the King: and 3. *Novem.* 1620 in the foresaid Action *Allanfon contra Stuart* and others for demembring him of a Thumb and three Fingers, and giving him seven bloody wounds; it was alledged for *Stuart* that one of the Defenders was fugitive and at the Horn, and had thereby taken the Crime on him; and *l. si in rixa percussus* 17. ff. de *Sicar.* was cited, which was also repelled, and he was remitted to the knowledge of an Inquest. The like 6. *January* 1662. *Advocatus* contra *Bates* and others for Slaughter. And yet 10. *June* 1618. *Robertson* against *Ross* for mutilating him in his right hand, it being alledged for *Ross* the Pannel, that one was at the Horn for that Crime, and fugitive, the Affize cleared the Pannel; but the truth is there was no Probation in the case against the Pannel, and a testificat was produced under the hands of famous Gentlemen laying the Guilt on the Fugitive: See our Author, *tit. 11. num: 12.* speaking of *homicidium in rixa*, where many are conjunct Actors.

89 Tenthly, It has been anciently sustained for a Defence as well in *Homicide*, as in *Mutilation* and *Demembration*, that the Party killed or wounded was denounced Rebel, or, as we call it, at the Horn at the time for a criminal cause. This was found in the Action *Anno* 1610. *Ker* of *Ferneherst* against *Turnbulls* and others, and the extract of the Horning was found probative, and Relaxation was sustained by way of reply, to elide the Horning. The same was at length debated from the Civil Law, and D.D. 20. *Nov.* 1618. *Meldrum* against *Meldrum* of *Eden*, but not decided. And is like the Question among the D.D. If it be lawful to kill *Bannitus* or an outlaw? whereof he who desires to be satisfied may consult *Farinacius prax. crim. q: 103:* It seems that before the year 1612. a Defence founded on a Denunciation for a civil Cause was a ground of Defence, because by the third Act of the Parliament that year, it's statuted and declared, that for time coming it should not be lawful for any man to kill or mutilate any of the Subjects on the account of their being at the Horn for civil causes, under the pain of being punished as Murderers and Mutilators, with this Declaration, that the Act should take effect heirafter allan-erlie which implies that a Defence on an Horning for a civil cause, was good before. Our Author hath fully discussed this Question *dict. tit: of murder, N:*

19. 90 But before a Pannel at the Horn (for not finding Caution to compare) taken with Caption and presented to the Bar will be allowed to propound his Defences, he must relax. So it was found by the Justices 9. *May* 1605. *Skirven* against *Forrester*, for mutilating him of the Right Hand; where this Alledgance that Defence was *juris naturalis* was proponed and repelled: But if there be any Nullities in the Horning, the Pannel may propound them; as was done in the said case.

91 Eleventhly, If the pain of Retaliation be expressly craved in the Libel (as was in the foresaid case. 28. *July* 1647. *Forbes* of *Lesly*, against *Pitfodells*;) the Pannel will be forced to debate how far the Law of Retaliation, given to the Jews, is obligatory upon other Nations; so it was there debated, but not decided. This Point I shall labour to clear hereafter.

92 Lastly, It's a good Defence, that the Pursuer did mutilate or demember himself; this (though contrary to the Libel) was found relevant 12. *January* 1642. *Taylor* against *Norie*; for mutilating him of his Thumb: against which the Pannel offered to prove that the Pursuer did mutilate his own Thumb when he was rashly drawing his Sword.

93 These are the particular Defences, which I find in the Books of Adjournal; to which I may add this General: That whatever Defence is competent against Homicide, is also competent against Mutilation and Demembration; *mutatis mutandis.*

Now

Now I come in order to speak to the Probation of the Libel and Defences, 94 which (in as far as it coincides with Probation in other Crimes) needs not to be spoken to. I shall only mark two things.

First, That as in an Action of Homicide, if the person said to be killed be 95 produced alive at the Barr; as in the case mentioned by *Amicus Robertus rer. jur. lib. 1: c. 4*: (and which was once done in a Pursuit at the instance of a Gentleman against his Neighbour, for alledged killing of his Shepherd, recorded in the Journal Books, but their Names escape me) then it would be very superfluous to prove by Witnesses, that the person said to be killed, is alive, because the Judge and Inquest see him: Even so in a Libel of Demembration, ex. gr. of an Hand, if it appear by ocular inspection that the Pursuer have both his Hands; as in the case of *Arsenius* said to be murdered, and demembred of a Hand, by *Athanasius*, and thereafter for vindication of *Athanasius*, brought in alive having both his Hands. *Socras: eccl: hist: lib. 1. cap: 21*: and *Ruffin: l: 11: c: p: 17*. I say in all or any of these cases, the Judge and Inquest can cognosce the matter by its notoriety; just so if an Hand, said to be mutilated, appear by ocular inspection, never to have been mutilated, or to be perfectly recovered; the Judge & Inquest need no further Evidences. So they did in the cases 28. July. 1627. *Paterson* against *Wordie*, and 19. Novemb. 1657. *Inglis* against *Martin*.

But 2. If there be any doubt in the case; as falls out when the Hand or 96 Fingers are wounded; and no mutilation committed, but only pretended to be committed; the Truth in that case must be discovered: Either by the Oath of Calumny of the Party pretending to be mutilated; or, by Witnesses who saw him express Signs of recovery: as was done, N: 76: *supra*: Or, by the tryal of skilful Chyrurgions, who must declare their Opinion upon Oath, before the Judge and Inquest; and as this is our dayly Practice, so is it the custom of forraign Courts, as *Caballus* testifies in *dist. cent. Resol. 3. cas. 236. N. 113. & seqq.* where he cites *Angelus* instructing Judges to advise with skilful Physicians and Chirurgeons in ambiguous cases, how far the Member ex. gr. the Hand is mutilated or debilitated (for these two are but one and the same with him) by incision of the Thumb or other Fingers, and to record their Opinion or Report, among the Acts of the Process: And as *Caballus* relates this as the Advice of *Angelus*, so he says that he hath seen this frequently practised by Judges, and that he himself has often practised the same; and particularly that he has seen many Reports of skilful Chirurgeons concerning Debilitation or Mutilation of the Hand by Incision of the Thumb, or by Wounds given in the Fingers of the Hand, and sometimes by Amputation of two Fingers, so that the Hand ceased to exerce it's proper Office, and became almost unprofitable; and in all these cases, the Delinquents were condemned to undergo the punishments imposed by the Laws and Statutes of the Place where the Crime was committed.

The Justices, with us, do never accept of the single Testimonies of Physi- 97 cians and Chirurgeons; but oblige them to depone, or declare upon Oath; notwithstanding they have often contended, that the Oath *de fidei administratione*, they gave at their Admission was sufficient for all: So it was decided; 20. July 1627. *Paterson* against *Wordie*; and for the same cause the Justices do reject Testificats subscribed by them, unless bearing upon Soul and Conscience. So they did 7 Novemb. 1621. *Williamson* against *Paton*; and 15. Decemb. 1630. *Barclay* against *Kennedy* in *Mayboll*, in which last case, the Testificat was subscribed by the Deacon of the Chirurgeons of Edinburgh and other two of the Trade. And the like Objection was made 12. January 1642. against a Testificat produced by *Taylor* against *Norie* to prove the Libel, notwithstanding it was written by the Clerk of the College of Chirurgeons, and subscribed by four of them. And that this is agreeable to the Opinion of the DD.

of Law and practice of Forraign Courts ( what ever be pretended to the contrary ) will appear by the following Citations of Law and DD. *as Crusius de iudiciis delictorum* p. 2. C. 20 N. 13. & *seqq. Mascard. de prob. vol. 3. conclus. 1175. N. 40. & N. 50. Baldus & Salicetus, l. hac editali. 65 §. his illud 1. de sec. nup. and others cited by Mascardus, dist. N. 50. Farin. vol. decision: crim. decis. 346. N. 5. & N. 6. and Decis. 365. N. 1. and 5. Vid. etiam Carpx. Criminal. p. 1. qn. 21. N. 8. and qn. 20. N. 38. & *seqq.* and the DD. cited by him : As also *Matthæus de sec. capi 3: N. 17: likewise Gail: 1: obs: 111. N. 3. all of them asserting and proving that their Oaths should be taken. This was expressly enacted by a Constitution of Charles the fifth Artic. 149. cited by Carpx. dist. N. 38. and decided in Camera imperiali. Mynsyng. cent. 6 observ. 34. Vid. dist. Crusius, loc. citat. N. 19. and Bald. in l. 20. C. de fid. instrument. And there should be at the least two of them, if they can be had. Matthæus Ibid.**

There are some cases wherein Physicians and Chirurgeons are not obliged to swear. as 1. If they be assumed by the Judge ; or 2. if they be chosen by mutual consent of Parties ; to declare aient the nature of the Thing ; no more than a tutor Testamentar is obliged to find Caution, and the same Reason is for both ; viz. because they trust their Faith by choosing them. *Mascard. dist. conclus. N. 51. Mynsyng. cent. 5. dist. observ. 34. N. 13. and 14. Or, 3. If the Physician or Chirurgeon be appointed by publick Authority, for such business, and sworn at the beginning. Mynsyng. dist. N. 14. Carpx. qu. 26. N. 4. And so I understand Matthæus, saying, it's sufficient they were sworn at their entrie to their Office. dist. N. 17. but withal they should be put in mind of their Oath formerly given.*

- 98 From hence it followes, that the Assizers who are to judge on a Probation wherein so many Difficulties occur, upon the Qualities of Wounds and Chirurgical Terms, should be more than ordinary intelligent : otherwise they who in dubious Cases incline to absolve, may probably free the guilty upon some mistaken point. This fell out in the foresaid case 8. July 1643. *Logie* against *Howison* for Mutilation of an Eye : the Pannel was by them cleans'd upon a point that arose from the Probation ; viz, that the Pursuer gave ill words, & thereby provoked the Pannel to give the stroke which occasioned the Blindness, and yet this was neither pleaded nor relevant ; for the Law does not allow Compensation betwixt verbal and real Injuries. And Advocats who plead these cases, may likewise see how necessar it is for them to study the *Quæstiones medico-legales*, without which it is not possible for them to understand some Texts in Law ; *l. 12. ff. de Statu.* And many other Laws in the *Titles ad leg. Aquil. & de Edil. edit.* But we need not give instances, seing the large Volume of *Panlus Zacchias* frequently above cited, contains hundreds of Instances. And *Matthæus, dist: loc.* thinks it may be useful also for Judges to understand these things, that they be not easily deceived by the Reports of corrupted Chyrurgions ; and in order to this, he lays before them the 18 *Aphorif: of Hippoc: de vulneribus lethalibus, sect: 6: and the words of Celsus, lib: 5: cap: 26: as a particular case to be understood.*



A  
**TREATISE**  
OF  
**MUTILATION and DEMEMBRATION**  
**PART. II.**

WHEREIN the Punishments of these Crimes are handled; *Retaliation*, which is the first of them, distinguished; and the Practice of that *Species* thereof called *Pythagorical* or *Arithmetical*, refuted; from the Opinion of Divines and Lawyers; and even from the Opinion of the *Rabbies*: The other *Species* called *Aristotelical*, *Analogical* or *Geometrical*, reconciled to natural Equity, and to the Law of GOD. The Punishment of *Amputation of a Hand*, though in many Cases practised, yet, rejected from being the ordinary Punishment of these Crimes. *Arbitrary Punishments* asserted in place of both; and a well regulated Arbitrary Power prov'd to be usefull and necessary to Judges, for augmenting and diminishing Punishments, in these and in other Crimes, according to Circumstances attending the committing of them. And the *Civil Law*, and the *Law* and *Customs* of this and other Nations are compared.

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By Sir **ALEXANDER SETON** of **PITMEDDEN** Knight Baronet, &c.

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By way of *Appendix* to the fore-going Book, written by the Learned Sir **GEORGE MACKENZIE** of *Rosehaugh*.

**ARRIUS MENANDER, L. 5. ff. de re Militari.**  
*Non omnes Desertores similiter puniendi sunt, sed habetur & ordinis stipendiorum ratio, gradus militiæ, vel loci, muneris deserti, & ante actæ vitæ: sed & numerus, si solus, vel cum altero, vel cum pluribus deseruit, aliudve quid crimen desertioni adjunxerit. Item temporis, quo in desertione fuerit, & eorum, quæ post gesta fuerint: Sed & si fuerit ultro reversus, non cum necessitudine, non erit ejusdem sortis.*

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**E D I N B U R G H,**

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## PART II.

# Of the Punishments of MUTILATION & DEMEMBRATION,

### Summaries.

- 99 *The DD. insist chiefly on three Punishments: Retaliation, Amputation of a Hand; and Arbitrary Punishment: And the Law of this Kingdom Cap. 11. Stat. Rob. 2. declares the Life to be in the Kings Will and redeemable; which may be reckoned as a fourth;*
- 100 *Retaliation described; and its various Names.*
- 101 *The Subject is, Juridico-theological, equally handled by Divines and Lawyers.*
- 102 *The Nature of Retaliation held forth in some Conclusions.*
- 103 *Concl. 1. Retaliation instituted by God in his Law, and delivered by Moses to the Jews.*
- 104 *Concl. 2. The execution of the Law of Retaliation committed to the Magistrates, and not left to private Revenge.*
- 105 *Concl. 3. The Law of Retaliation was transmitted from the Jews to the Grecians, but how or in what time is uncertain; some ascribing the Law to Rhadamanthus who was Moses in Mythologic according to Huetius; others to Charondas King of the Locrians; The words of their Laws set down.*
- 106 *Concl. 4. That Retaliation is founded on natural Equity, which consists in observing Equality between the Crime and Punishment; proved by five Arguments.*
- 107 *Arg. 1. Taken from the consent of Nations and Laws.*
- 108 *Arg. 2. Taken from the Testimony of Fathers, Modern Divines and Lawyers, asserting its natural Equity.*
- 109 *Arg. 3. Taken from various instances of providence inflicting Retaliation.*
- 110 *Arg. 4. Taken from Gods threatening Retaliation, against the Enemies of his Church in general, and the Chaldeans in particular: and also against his own people.*
- 111 *Arg. 5. Taken from the threatnings of Retaliation under the Gospel, which shews that the Law was not peculiar to the Jewish æconomie.*
112. *The Objections of Socinians and Anabaptists devised to overturn the power of Christian Magistrates answered: and the Authority of the Christian Magistrat asserted.*
113. *A farther proof by Instances of Providence under the Gospel, that the Law*



of Retaliation, was not abrogated under the Gospel; with a Reflection against the Deists denying the Validity of humane Testimony.

- 114 Concl. 5. *Although Retaliation be founded on natural Equity, and so is immutable, yet it doth not follow that it must be always executed according to pythagorical or Arithmetical proportion; but that Analogical or Geometrical proportion, as Circumstances require, is sufficient. And this proved by several Arguments.*
- 115 Arg. 1. *Taken from the Practice of the Jews in several particulars.*
- 116 1. *In many cases it was either naturally or morally impossible to execute strict Retaliation.*
117. 2. *It was lawful for the Jews to transact anent the punishment of Retaliation. Josephus his Opinion disprov'd. And the Practice of the Justice-Court anent Transactions justified.*
- 118 3. *And for the same Reason, the Jewish Magistrat was not obliged to enquire into these Crimes, when the Parties did not desire it.*
- 119 4. *If the Party injured did apply to the Magistrat, and insisted to have the pain of strict Retaliation inflicted, yet then in that case, the Judge was not obliged to inflict punishment according to the words of the Law, but he enquired into Circumstances and varied the punishment accordingly. All this is prov'd by many instances; particularly where the Qualitie of Parties was unequal.*
- 120 5. *When Quality and Circumstances were equal (which seems to be the only difficult Case) even then the Jewish Magistrat did admit of a Ransom and pecuniary Mult for punishment, which was done on five accounts condescended on by the Rabbies. The Law of Retaliation, concluded to be minatory, with a Rebuke to the Sadducees and their Successors.*
- 121 6. *A false Witnes occasioning Death to another was punished with strict Retaliation; but if by his Testimony he occasioned only Demembration; the difficulty is greater.*
- 122 Arg. 2. *Taken from the Agreement of the Laws of the XII. Tabb. as paraphrased by Jacobus Gothofredus, with the practice of the Jews and Doctrine of the Rabbies in several Instances.*
- 123 Inst. 1. *The Law of the XII. Tabb. allowed Transactions, as well as the Jewish Practice.*
- 124 Inst. 2. *Depalmentation by the Law of the XII. Tabb. was punished by a pecuniary Mult, and not by strict Retaliation. And this was the Jewish Practice.*
- 125 Inst. 3. *The Law of the XII. Tabb. de offe fuso, vel dentibus excussis, appoints pecuniary Punishment: and the same was augmented or diminished according to the Quality of the Delinquent; which was also the Jewish practice.*
- 126 Inst. 4. *In the Agreement betwixt the Laws and Practice of the Jews, and the Law of the XII. Tables, in the case of a false Witnes.*
- 127 Secondly, *the Greek and Latine Authors; and particularly Aristotle and Phavorinus understood the Law, si membrum rupsit, &c. not strictly but analogically.*
- 128 Phavorinus *did not believe strict Retaliation practicable, but argues against it.*
- 129 S. Cæcilius *in his answer to Phavorinus acknowledges there cannot be an exact Retaliation in Breaking and Bruising, and therefore concludes for an Estimat.*

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- 130 *An Epicrisis on the Reasonings of Phavorinus and S. Cæcilius.*
  - 131 *Strict Retaliation condemned by the Reasonings of Aristotle against the Pythagoreans.*
  - 132 *The Judgment of Aristotle to be preferred to that of Pythagoras; and why?*
  - 133 *Aristotle and Phavorinus censured by Bodinus, and he by Matthæus: and yet Bodinus no friend to strict Retaliation.*
  - 134 *The case of equal Circumstances considered by Bodinus.*
  - 135 *The Law of Charondas, of Eye for Eye, recorded by Diod. Siculus, proves not the general practice of strict Retaliation; it being not made for the sake of strict Retaliation, but with respect to the excellency of the Eye beyond other Members; and the like hath been since practised by Christian Emperours.*
  - 136 *Arg. 3. to prove that strict Retaliation though founded on natural Equity, admits of analogical Retaliation; taken from the authority of Divines and Lawyers; I begin with Grotius, eminent for his Knowledge in the Jewish and Christian Theology; and in the political Laws of both.*
  - 137 *The Testimony of Goodwyn & Ainsworth: Munster, and some Rabbies, cited by them.*
  - 138 *The Testimony of the Jews hath the more Weight, in that they were tenacious of their political Laws and Customs; as is prov'd by Instances; with the Opinion of St. Augustine and Isid. Pelusiot.*
  - 139 *A further Testimony of Goodwyn, for analogical Retaliation, following A. Gellius; with an Observation thereon.*
  - 140 *The Testimony of Paulus Fagius for the same.*
  - 141 *The Testimony of many other Divines condemning Pythagorical Retaliation.*
  - 142 *The Sadducees and wicked Manichees, Patrons of identical Retaliation.*
  - 143 *Strict Retaliation condemned by many famous Lawyers.*
  - 144 *Reasons why the Conference between Phavorinus and S. Cæcilius, recorded by A. Gellius, is to be regarded.*
  - 145 *The Law of Retaliation never executed among Jews, Grecians, or Romans in the strict sense; except the Crime were atrocious: Moderat Damages more agreeable to Christian meekness.*
  - 146 *First Objection bearing, that if strict Retaliation had not been among the Jews, there would have been no need of Exhortation to Meekness under the Gospel; answered.*
  - 147 *A second Objection taken from these words of l. 1. ff. ad leg. Aquil. Lex Aquilia, omnibus legibus quæ ante se de damno injuria loquutæ sunt, derogavit, five XII. Tab. five alia quæ fuit; enforced and answered: by shewing that the words omnibus derogavit, admit of Exceptions.*
  - 148 *The Answer illustrated by an Enquiry into the Date of the Lex Aquilia.*
  - 149 *The use of the Enquiry for knowing the Author of the Lex Aquilia.*
  - 150 *Amputation of the Hand is the second Punishment of Mutilation and De-membration to be spoken to; and why?*
  - 151 *Amputation of the Hand prov'd by many Instances of the Civil Law, to be the punishment of many Crimes committed by the Hand; and how that punishment is to be regulated?*
  - 152 *The punishment of Amputation of the Hand, is always in Saxony conjoyn'd with Relegation; and why?*

- 153 *An Argument taken from the Gloss and some Texts of the Feudal Law, to prove that Mutilation and Demembration, were punish'd poenâ amputationis manûs, because single wounding was so punish'd.*
- 154 *The Argument taken from the words of the Gloss put in form, and enforced from a Rule in Suarez; and answered, by shewing that single wounding was never punish'd, in that manner, unless joyn'd cum fractione pacis publicæ, to which the Law requir'd several Conditions there set down, which made the Crime atrocious.*
- 155 *Some Acts of Parliament, anent the Amputation of the Hand for carrying forbidden Weapons, explain'd.*
- 156 *An Objection answered.*
- 157 *Arbitrary Punishment, by the Civil Law, succeeded in place of Retaliation, and in place of the fix'd Mults of the XII. Tabb. If these Mults were enacted in maximâ veterum paupertate? (as Trebonian say) and abrogated on that account? For what Cause were the Words of the Law Si membrum rupsit &c. abrogated?*
- 158 *How long had Analogical Retaliation been in practice before Justinian introduc'd Arbitrary Punishment in place of all Retaliation?*
- 159 *Mutilation and Demembration punish'd arbitrariè, as other Injuries:*
- 160 *The nature of Arbitrary Punishment not understood by every one.*
- 161 *Arbitrary Punishment answers to Arbitrary Crimes. Ordinary and Arbitrary Crimes described.*
- 162 *Anciently all Crimes and Punishments were determin'd by Law; but multitude of Facts which could not be for'een gave occasion for Arbitrary Power to determine in Emergencies by the Rules of Equity.*
- 163 *This ancient and modern Custom, and the nature of Arbitrary Punishment held forth by Ulpian. Why a Judge call'd Legis auxilium?*
- 164 *Punishment in general as including ordinary and extraordinary or Arbitrary, described.*
- 165 *Arbitrium plenum or absolute; and regulatum or limited, described. A Judge, exercising unlimited power, call'd bellua & non judex.*
- 166 *Absolute, and Arbitrary power, are different things and have different Effects.*
- 167 *An Arbitrary Judge, is the same with a prudent and wise Judge described by Cicero; and is the same with Ulpian's vir bonus described by Alex. Neapolit.*
- 168 *An Arbitrary Judge has not power to do any thing that is unjust.*
- 169 *He cannot, without a just Cause, augment or diminish punishments which the Law has determin'd, nor recede from any thing determin'd by Law, unless the Law allows him to do it. What cases are said to be determin'd by Law?*
- 170 *He cannot totally remit a Punishment to gratifie the people, especially after Sentence. And its not always safe for them to remit, who have power to do it; prov'd by the authority of St. Bernard and Cicero.*
- 171 *An Arbitrary Judge cannot punish beyond merit.*
- 172 *He cannot punish one man for the Fault of another, though he were willing to undergo it: except in some particular cases.*
- 173 *He should not delay execution of Sentence beyond the ordinary time.*
- 174 *If Arbitrary Punishment can reach ad poenam Capitis?*
- 175 *If ad amputationem manûs?*



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- 176 An Arbitrary Judge may determine Punishment for extraordinary Crimes; and highten or lessen punishment in ordinary Crimes, if the Circumstances of Fact require it: and why?
- 177 There is a like necessity for Arbitrary Power in some civil Cases.
- 178 And yet for all this the Judge cannot be said to be more favourable than the Law; or that he contraveens it, or departs from it; but is rather Legis auxilium, and a Preserver of the Law, because the Law in some cases gives him that power.
- 179 Only Supreme Judges have this power; and inferior Magistrats must consult the Prince, especially after Sentence pronounced. Whether the Judge be oblig'd to express the Causes of his receding from ordinary Punishment? how far the Law presumes for the Justice of the Judge in ambiguo.
- 180 The Circumstances for hightning or lessening Punishments, are chiefly seven. Causa, persona, locus, tempus, Qualitas, Quantitas, Eventus.
- 181 1. Divers Considerations anent the Cause, viz. 1. If the Delinquent acted ex proposito, or not. 2. If the Crime be consummated or attempted only. 3. If the Delinquent acted of his own accord, or by command of another. What the Judge ought to do in each Case.
- 182 2. As to the Person whether Agent or Patient, it makes a great alteration in Punishment. Each should be considered as to Sex, Age, State, and Quality or Dignity.
- 183 3. Place; of Committing, augments or diminishes the nature of the Punishment; prov'd by Instances.
- 184 4. Time; varies the Punishment: which is also prov'd.
- 185 5. The Quality of the Fact makes the Crime more or less atrocious, and varies the Punishment.
- 186 6. Quantity; distinguishes furtum ab abigeo.
- 187 7. Event encreases punishment and Damages; as when the hand of a skilful Artificer is struck off.
- 188 Damages are due by the Rules of natural Equity; proved by the Authority of Farin. and Marfil.
- 189 How far Delinquents are lyable for Damages, intrinsick or extrinsick; and both these Damages described.
- 190 Obligation to pay Damages founded on Exod. 28. 19.
- 191 Damages to be modified at the arbitrement of the Judge; and by what means he should inform himself. Other five Circumstances for mitigating Punishments.
- 192 Of the Practice of Scotland anent punishing Mutilation and Demembra- tion; and decerning of Damages: The words of Cap. 11. Stat. Rob. 2. which are the foundation of all, set down.
- 193 If there be any Warrant, from the words of the Statute, to punish Mutilation and Demembration capitally; debated pro & contra, and resolved Negative.

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I Have now done with the first Part of this Appendix; and therein I have shown what it is to *Mutilat* and *Detruncat* a proper Member of a Mans Body; and how to pursue and defend Actions thereanent. I come next in this second Part to speak of *Punishments* and *Damages*; which are not always the same, but vary, in these as in other Crimes, according to Circumstances; *tol. tit. ff. de penis. Farin. 11. 87. & seqq. de penis temperand.* The DD. insist chiefly on *Retaliation*, *Amputation* of a Hand; and *arbitrary punishment*; and there is a Fourth, mentioned in an ancient Statute of our Law, *viz. cap. 11. stat. Rob. 2.* where it's said, that for wilfull and premeditated *Mutilation* ( which is there understood for *Demembration* ) the Delinquents Life shall be in the Kings Will and redeemable.

*Retaliation*; which is the first of these, is a Punishment of equal Retribution, or the doing to one as he hath done to his Neighbour; instituted by GOD; committed to the Jewish Magistrat for Execution; and thereafter received by the Gentile Nations, upon the account of it's natural equity, and executed by the Rule of Geometrical Proportion. All which I shall make appear in several Conclusions. Cardinal Hugo on *Exod. 21. 23.* thus expresses it; *Talitur ladendus est justè, qualiter ipse injuste fecerit alii. Pœna talionis* is not expressly mentioned among the Laws of *Justinian*; except in *§. pœna 7. inst. de injur.* but we find it in *Novel. Leon. 60. & 92.* The Reason why it's but once in *Justinians* Law, is, that when *Trebonian* composed the Law, *Retaliation* of one Member for another was worn out, and in place thereof *actio injuriarum* had succeeded, as in *dist. §. Pœna.* It's oftner in the Canon Law, as in *C. Pœn. 14. q. 1* and in *C. sex differentia, 23. q. 3.* and in *C. calumniator. 2. q. 3.* but it's frequent among the DD. as *Joh. Clarus, Farinacius, Cujac. Bart. Bald.* and others. And among the *Rhetoricians*; as *Quintil. declam. 297. & 352. Senec: Controvers. 2. lib. 3. & contro. 33. lib. 3.* and it's to be found in *Symmach. Epist. 59. lib. 1. & Epist. 27. lib. 3.* and *Sidon. Epist. 3. lib. 5.* and the Essence of it consists in the cutting off one Member for another, as appears by the punishment of him who makes an *Ennuch*; *Novel. Justin. 142. Cap. 1.* It hath it's name from the Latine word *Talis.* *Voss. in Etymol.* which denotes an Equality betwixt the Crime and the Punishment; and for this Cause it's likewise call'd *pœna similis supplicii*; in *l. ult. c. de accusat. & l. ult. ff. de calumniat. Pœna reciproci.* in *l. 3. lib. 9. c. Theodos. de exhib. vel transmitt: reus.* And *pœna parv vindictæ*; *quasi tætorabua*, or the suffering of the same thing. It is several times called by *Aristotle* *ἀντιποδοι lib. 5. Ethic. cap. 5. i: c. contrapassum*: All these are Names denoting Equality.

The Subject is *Juridico-theological*; and therefore in handling of it the DD. of Theologie cite Law and Lawyers; and the DD. of Law cite the Sacred Scriptures and Divines, which must be my Method at present; For as in the first part I made use of *Physicians* to assist the Lawyers; so in this second Part I must call *Divines* to my Assistance.

And because the Subject is full of Difficulty, especially as to the Obligation of the Law of *Retaliation* under Christianity, I shall labour to clear the Difficulties in a few Conclusions, whereby the divine Authority and natural Equity



thereof shall be proved in the first place, and yet it shall be shown in the second, that it was not intended to be always executed in the strictest and literal Sense, but according to the Rules of Geometrical Proportion and distributive Justice.

103 *Conclus.* 1. All, except *Deists* who deny the Authority of the Books of *Moses* and reproach this Law, (as you may see in *Nichol's Dialogue* with the *Deist*) acknowledge that the Law of *Retaliation*, was one of the Laws which *Moses* received from God, and delivered to his People the *Jews*. For first God gave this Law to secure the Life of man *Gen.* 9: 6. in these Words, *He that sheddeth mans blood, by man shall his blood be shed*; and having declared it to take place in all cases of wilful Homicide, *Exod.* 21. 22. 23. 14. 18. 19. 20. 21. 22. 23. with Certification in the last of these Words, that *Life should goe for Life*. He thought fit, by a further step of his wise providence, to forbid *Demembration* under the like pain. *vers.* 23. *Eye for Eye; Tooth for Tooth; Hand for Hand; Foot for Foot*. As also *Mutilation* and lesser Hurts, *v.* 25. *Burning for Burning; Wound for Wound; Stripe for Stripe*: These are the Words of the first Institution of the Pain of *Retaliation*; which is renewed *Levit.* 24. 19. 26: *If a man cause a Blemish in his Neighbour as he hath done, so shall it be done to him; Breach for Breach; Eye for Eye; Tooth for Tooth: As he hath caused a Blemish in a man so shall it be done unto him again*. Further, lest this should be thought to reach the *Percussor* only; It's declared *Deut.* 19. 6. and subsequent Verses, to extend also to a false Witness, by whose false Testimony the Life or Member of an innocent man should be taken away. All these places of Scripture serve to illustrate the above mentioned Description of *Retaliation*; because the very words in the Texts *Eye for Eye, Tooth for Tooth, &c.* are as so many Examples of the Equality to be observed in Execution of the Law either Literally; or Analogically, by geometrical Proportion.

104 *Conclus.* 2. This Law was not a business of privat revenge, and therefore the executing of it was not committed to the Party injured (as some Commentators on *Math.* 5. *vers.* 38: 39: &c. charge upon the Sadduces) *nullo enim modo servaret ille modum*, says *Estius* in *Exod.* 21. 23. but the Execution was committed to the Magistrat; for *Deut.* 19: 17. it's expressly said, that *both the men between whom the controversie is, shall stand before the Lord, before the Priests, and the Judges which shall be in those Days*. And all privat Revenge, yea even private hatred, was expressly forbidden the *Jews*. *Levit.* 19. 17. 18. *thou shalt not hate thy Brother in thy heart: thou shalt not avenge nor bear any grudge against the children of thy people*, And the Roman Law, *101. tit. C. Ne quis in sua causa*; permits no man to judge in his own cause, except supreme Judges.

105 *Conclus.* 3. This Law of *Retaliation*, with many others of the Jewish æconomy, was transmitted to the Gentile Nations, & particularly to the Grecians; (who were the most learned and polite of all others,) but it is not agreed upon, neither as to the manner how, nor the time when, the Grecians received them. *Dan. Huetius*, in his Book intituled, *Demonstratio Evangelica prop. 4. cap. 8. n. 2.* cites Authors, who say, they might have received them from *Cadmus* and *Danans*, who being contemporaries with *Moses*, were forc'd to fly from their own Country of *Agypt*, and sheltered themselves among the *Grecians*, and taught them those Laws. And he *dict. prop. cap. 11.* insists at large upon the transmission of these Laws to the *Grecians* by the *Syrophenicians*; but Authors (whom he cites) do not agree about the time. Some think it was when the *Syrophenicians* fled from the Sword of *Joshua*, invading

ing their Country; others think, that the *Syropheicians* themselves had never learned these Laws, before *Solomon* sent many thousands of his People to provide Materials for the building of his Temple, 1 *King*. 6. But the *Grecians* had the Law of Retaliation long before this time, if credit may be given to the *Pythagoreans*, who (as *Aristotle* says, lib. 5. *Ethic*. cap. 5.) ascrib'd this Law to *Rhadamanthus* King of *Lucia* as its Author, in these words, *Quod quisque fecit patitur; autorem scelus repetit; suoque promittitur exemplo nocens*: Nay, it must be older than *Solomon*, if *Rhadamanthus* enacted it, for *Pursellinus* in his *Epit. Hist.* makes him contemporary with *Josua*: and according to *Huetius*, *diſt.* c. 8. N. 12. he was the same with *Moses*. *Calvissius*, *Helvicius* and *Nauclerus* calculat him to be about the same time. But *Diod. Sicul.* lib. 12. ascribes the Law for the Eye, *Si quis oculum eruerit, oculum reo pariter eruito*, to *Charondas* King of the *Loerians*, surnamed *Thurius*, (because he gave Laws to the *Thurians* or *Tyrrians*. *Tiraguel* in his Notes on *Alex. ab Alex.* lib. 6. *dier. genial.* c. 10.) and then, as to that particular Member, the Law was of a later date. But leaving these Chronological Inquiries, because the Heathen Histories of these times, from which they are taken, are very uncertain; according to the learned *Stillingfleet*, *Orig. Sac.* cap. 1. in fin. It's enough for our design that we find the Law of Retaliation, among the *Grecians*; and no man will deny this who reads *Aristotle* *diſt.* l. 5. *Eth.* cap. 5. *Demosth.* in *Timocr.* *Diog. Laert.* lib. 10. And *Huetius* *diſt.* prop. 4. C. 11. p. 161. is positive, that the Law of Retaliation, was one of the Laws which descended from the *Jews* to the *Grecians*, & transmitted by them to the *Romans* in the XII. Tables, l. 2. §. 44. ff. de orig. jur. anno V.C. 300. whereby it is agreed, that it was a Law anciently among the *Grecians*, and that they honoured it for its equity, by ascribing the general Law, *Quod quisque fecit patitur*, to *Rhadamanthus*, and the particular Law, *Si quis oculum eruerit*, to *Charondas*; both fam'd for their Equity and Justice, as *Virgil*. *Æneid.* lib. 6: and the *Mythologists* testify of the first; and *Val. Maximus* testifies of the last, lib. 2. cap. 5. but by instancing a Heathenish piece of Courage.

**Conclus. 4.** This Law of Retaliation is founded upon natural Equity, which consists in observing equality between the Crime and Punishment. This I prove by the following Arguments. 106

**Argum. 1.** Common consent of all Nations in the receiving a Law, is a good Argument for its natural Equity; and all Nations have agreed to receive this Law. This we have already shewn, as to the *Grecians* and *Romans*; N. 105. *ſupra*. As for other Nations, their receiving this Law of Retaliation, see *Dempst.* lib. 9. *Rosin.* in *paraleip.* p. 940. *Cujac.* lib. 7. *observ.* cap. 13. *P. Herodius*, *rerum judicat.* lib. 6. tit. 5. de injur. c. 20. *Forner.* lib. 3. *select.* cap. 28. *Faber.* lib. 3. *Semest.* cap. 19. and *Covarruv.* var. *Resolut.* lib. 2. cap. 9. Moreover, the Authors of particular Texts in the *Roman Law* are positive in this point of natural Equity; as, *Ulpian.* in l. 1. ff. *quod quisque juris*, who there says, *Quis aspernabitur idem jus sibi dici, quod ipse aliis dicit.* And the foresaid *Joannes Suarez.* *diſt.* cap. N. 7. says, that he believes the *Prætor* introduced the Law of Retaliation against the *Magistrat*, who contrary to his duty, decerned unjustly; and therefore an *anonymus* German in his Book intituled, *Jus ff. illustratum*, inscribes his Notes upon that Title, in these words: *De jure talionis sive re-torsionis.* See *Maranus* (*Cusacius* his Scholar) on the same Title. And *S. Cæcilius* apud *A. Gell.* lib. 20. c. 1. disputing for the Equity of the Law of Retaliation in the XII. Tables, against *Phavorinus*, has these words, *Quæ, obsecro, ista est acerbitas, si idem fiat in te, quod tute in alios feceris?*

**Arg. 2.** It's natural Equity is asserted by many great Authors, as by *S. August.* lib. 21. de Civit. Dei. Cap. 11. Expostulating with the Gentiles who laboured

from the natural Equity of this Law to confute the belief of Eternal punishment: as if it had been disproportional to a temporal Sin; not knowing that the Sin was measured from its being against an Eternal Majesty, Infinite in Justice. Of this Opinion also are, *Gratian: in C. penus 14. qu. 1. & in C. sex differentia 23. q. 3. Tertul. lib. de patientia cap. 6. Origines, homil. 10. in Exod: D: Ambros. lib. 1: officior. cap. 48. D. Valerianus in serm. de bono disciplina. S. Isidorus pelusiota lib. 2. Epist. 133. Abulensis in cap. 24. Levit. all cited by Johannes Suarez de mendoja ad l. Aquil. C. 2. in apparatu N. 6: where he says plane hac de talione lex non solum bono sed æquo convenit; quia in pena æqualitate versatur, sed nulla esse reperitur, quæ magis secundum naturam sit: nitebatur enim naturali hac ratione qua æquissima omnibus visa est; nimirum quod in se patitur quisque quod fecerit alteri. And again N. 8. Igitur cum hæc lex naturali ratione suffulta sit. Inde est quod omnes Gentes eadem lege regerantur, & ab omnibus per æqua custodiebatur. And this Answer exactly to the Definition of natural Equity given by Aristotle lib. 5. c. 7. where dividing *jus in quærit & requirit, naturale & legitimum*, he calls *naturale, quod ubique eandem habet vim, & non quia sic videtur aut non videtur*. And *legitimum, quod initio quidem liberum est, postquam vero constitutum sit, observari necesse est*. This natural Equity is also asserted by learned Divines, *Andreas Rivetus ad Exod. 21. 24. N. 3. 4. And Antonius Walaus oper. tom. 2. p. 290. col. 2. as also by Soto, tractat de inst. & jur. lib. 5. art. 4. in the case of punishing Accusers; and by Episcopius, inst. l. 3. Sect. 2. c. 12. The same is also maintained by Farin. prax. crim. qu. 16. de accusat. N. 2. and by Vander Muelen: p. 2: qu. 15.**

109 Arg. 3. As this is evident by these many Authorities, so it is proved by the following Acts of Gods special providence and vindictive Justice executed, by the Rule of Retaliation, against heinous Offenders, and notorious Malefactors; as upon Pharaoh, by drowning him and his Host in the Red-sea, in Retaliation of the Command to drowne the Male-Children of Israel. Exod: 1: 22: In like manner Adonibezek King of Bezek who had cut off the Thumbs and great Toes of 70 Canaanitish Kings, had his own Thumbs and great Toes cut off by the Tribe of Judah, Jud: 1: 6, 7. where he acknowledges the justice of GOD in this Retaliation, saying, *AS I have done, SO GOD hath requited me*. And when Samuel hewed Agag the King of the Amalakites in pieces before the LORD, 1 Sam. 15: 33: he said unto him, *AS thy Sword hath made Women childless, SO shal thy Mother be made childless among women*. These three were Gentile Kings, who could not suffer by the Law of Retaliation as it was a Law of the Jewish æconomie, but as it was a Law of natural Equity. We have another Example of the executing of this Law by vertue of its natural equity, even before its Promulgation by Moses, viz: upon Josephs Brethren; they had cast him in a Pit, and had no regard to the Intercessions made by him, or for him: Gen: 37: 21, 22, 23, 24: and he again on another occasion (but with a better design) had no regard to their Intercessions, but cast them in Prison, Gen. 42. 9, 10, 11, 12, 13, 14, 15, 16, 17. and verse 21. they acknowledge the Justice of this Retaliation, saying to one another; *We are verily guilty concerning our brother, in that we saw the anguish of his Soul when he besought us; and we would not hear, therefore is this distress come upon us*.

110 Arg. 4. The natural Equity of this Law is prov'd by GOD's threatening to retaliate upon the Enemies of his Church in general, Isa. 33. 1. When thou shalt cease to spoil, thou shalt be spoiled; and when thou shalt make an end to deal treacherously, they shal deal treacherously with thee. And against the Chaldeans in particular, Habak. 2. 8. Because thou hast spoiled many Nations, all the Nations of the People shal spoil thee. And not only did GOD threaten the Heathen Nations, but even his own People the Jews, Dent. 32. 21. yea, even



even David himself, 2 Sam. 12. 9, 10, 11. Sword for sword, defilement for defilement. And Solomon tells us, Prov. 21. 13. Whoso stoppeth his ears at the cry of the Poor, he also shall cry himself, but shall not be heard. A Threatning worthy to be observed in this time of Scarcity.

Arg. 5. If the Law of Retaliation had not been founded on natural Equity, but had been meerly for the State of the Jews, then it could not be obligatory under the Gospel, but it is obligatory; as appears from Matth. 7. 2. With what judgment you judge, ye shall be judged; and with what measure you met, it shall be measured to you again. And Rev. 13. 10. He that leadeth into captivity, shall go into captivity; and he that killeth with the sword, must be killed with the sword. And many Nations observe it in particular Cases.

And whereas it is Objected by the Socinians and Anabaptists following them, out of design to overturn the Power of the Christian Magistrat, that Christ's own words, Matth. 5. 38, 39, 40, 41. do abolish this Law. It's Answered by Rivetus, *dist. loc. Ex. d.* and by the judicious Calvin; by Marlorat, Maldonat and others on our Saviour's words, Matth. 5. 38, &c. and by Lorinus in Levit. 24. 19, 20. that all that Christ intended, was to recommend Christian Meekness and Patience, but not to wrong the Power of the Magistrat, which is frequently asserted under the Gospel; as Tit. 3. 1. 1 Pet. 2. 13. and Rom. 13. 1, 2, 3, 4, 5. where we are commanded to be subject to superior Powers, who are a terror, not to good Works, but to the evil: and vers. 4. He bears not the sword in vain, for he is the minister of God, a revenger to execute wrath upon him that doth evil, and therefore we are to be subject, not for servile fear only, but for conscience sake. Farther, Calvin and Rivetus say, that Christ intended to correct an error of the Pharisees, who believed that the execution of the Law of Retaliation was committed to every privat person; but Maldonat on the Text dissents from this thinking the Pharisees could not be ignorant of the Prohibition, Levit. 19. 17, 18. Thou shalt not hate thy brother in thy heart; and thou shalt not avenge, or bear any grudge against the children of thy people.

Further, to show that this Law was not abrogated under the Gospel, GOD by many acts of his special Providence has inflicted the punishment of Retaliation under the Gospel; as in Herod, who Matth. 2. 16. sent forth and slew all the children in Bethl. hem, among whom (he that should have succeeded him) was also slain. Vid. Macr. b. lib. 2. Saturn. cap. 4. and Spanhem. his disquisition upon it, *dub. evang. Vol. 2. dub. 76.* As also, the Daughter of Herodias who contrived the beheading of John the Baptist, Matth. 14. was (as she passed a River) beheaded by the Ice, holding her fast by the Neck, whilst her Body danced under the Waters. Nicph. lib. 1. *hist. cap. 20.* And the Jews, who concurred in the wicked crucifying of our blessed Lord, were crucified in great numbers dayly at the Siege of Jerusalem, by Titus the Son of Vespasian. Joseph. de Bello Jud. l. 6. cap. 12. And Valens the persecuting Arian Emperour, may be adduced as another Example, who having burnt fourscore Orthodox Christians coming from Constantinople to Nicomedia unto him, humbly to plead their Cause, was himself at last burnt in a little Cottage, where he had hid himself, when flying from the Goths; Socrat. *Hist. Eccl. l. 4. c. 3.* And some later Examples are recorded by Camerarius in his *Historical Meditations cap. 98.*

After all which Proofs, the natural Equity of this Law is not to be doubted; so that the Deists, who object this Law as a foolish and unjust Law, to refell the authority of the Books of Moses, may see that the Gentile Nations have honoured this Law, if credit may be given to the best humane Authority; which if the Deists reject, (as often they do, for supporting their Cause)

they will not be able to prove who are their Fathers, and so may, after their death, lose the Right of Succession.

114 *Conclus. 5.* Tho' it be proved that *Retaliation* is founded on *naturalequity*, and so is immutable, yet nevertheless it will not follow that it must *always* be executed according to an *Arithmetical*, *Identical* or *Pythagorical* Proportion; that is to say by taking *Eye for Eye* in a literal sense, which *Aristotle* says the *Pythagoreans* maintained; but its sufficient for satisfying the Law of *natural equity* that the punishment be executed according to a proportion *Geometrical*, *Analogical*, or *Aristotelical*; that is to say, by paying of an equivalent, according to time, place person, and other Circumstances attending the committing of the Crime: This I shall prove by several Arguments, *viz.*

115 *Argum. 1.* From the practice of the *Jews*, who may be admitted to clear the sense of a Political Law of their State, because they were the first Receivers of it; and they neither did, nor in all cases of Bodily Injuries could, observe any other but *Geometrical Proportion*; For, as it appears by the Particulars following,

115 1. In many Cases it was impossible to take *Retaliation*; as in the Example, *Exod. 21. 22.* of a Woman who by a Hurt given to her by mens striving together, makes an Abortion, or parts with an inanimat Child; the man could not be punished by a *Pythagorical Retaliation*, but a Sum of Money succeeded in place of Punishment, by the words of the Text. In like manner, there could not be a *Pythagorical Retaliation* in Injuries done to the Body by Rapes and Adulteries; and therefore when *Sampsons* Father in Law, with concurrence of the *Philistines*, took his Wife from him and gave her to his Companion: *Sampson* did not take their Wives and bestow them upon others, according to the literal sense of the Law of *Retaliation*; but he, as a Judge and Ruler in *Israel*, having power to take Revenge for Injuries done to the Person and Honour of his Wife, compensated them by burning of their Corn, with their Vineyards and Olives, &c. *Judg. 15. 5.* Yet nevertheless, he excuses his taking revenge, in words declaring it to be *Retaliation*, saying, *vers. 11. AS they did unto me, SO have I done unto them.*

117 2. The Law of *Retaliation* did not hinder the *Jews* to transact for the Injuries done to their Persons except Death was the Consequence of the Injury, and this is inferred from Gods prohibiting Transactions simply in the case of *Homicide*, *Numb. 33. 31. ye shall take no ransom for the life of a Murderer*: So *Ainsworth* on *Exod. 21. 23.* infers. [ *Josephus Antiqu. lib. 4. cap. 46.* gives the Election to the Pursuer whether he will have the Fine or the reciprocal Punishment: but *Ainsworth*, a man well versed in Rabbinical learning, observes no such thing out of *Maimonides*, whom he adduces to prove their custom of transacting. ] And this serves to vindicate the practice of the Justice Court, where such transactions are judicially allowed, as we shew among the Defences, *N. 74. 77. 78, 79. supra.* which prove that these kind of Injuries are but *privata delicta*, wherein the Publick is not concerned.

118 3. For the same Reason, (*viz.* That *Passion* or *Transaction* was allowed to the *Jews*, *tanquam in delictis privatis* ) their Judges never did, nor were they obliged to enquire in these Crimes. And this is inferred from *Deut. 19. 17, 18.* where it's said, *That both the men between whom the controversie is shall stand before the Lord, before the Priests and the Judges which shall be in these days*; and then, but not till then, it's said, *the Judges shall make diligent inquiry.* This is another of *Ainsworths* Observations; and it agrees with the Civil Law, and our practice mentioned, *dict. N. 79. supra.*

119 4. If the Party injured did apply to the Judge, and insisted to have the Pain of *Retaliation* inflicted, yet even in that Case the Judge was not always oblig'd

to inflict it according to the words of the Law, but was to enquire into the circumstances of time, persons, place, age of the Delinquent, as also his strength to undergo the Punishment, without the loss of his Life; for a sickly man, by the loss of his Hand, might lose his Life; likewise, the taking away the Eye of a *Monoculus*, or the Hand of a Delinquent, who had but one, would be harder to him, than what he had done to one having two Eyes or two Hands; the Judge was also to consider, whether he was pursuing or defending when the Crime was committed; and according to these and other Circumstances he was to punish or not punish, & to lighten or lessen the Punishment as he should think fit, *ex. gr.* though the Rule of Retaliation foresaid in *Hurts*, be only simple Retaliation; *Stripe for Stripe*, yet the single smiting of Father or Mother was punished with Death, *Exod.* 21. 15. And on the other Hand; if a Master smite out the Eye or Tooth of his *Man-servant* or *Maid-servant*, the Master was not punished with pulling out of his Eye or Tooth, but the *Servant* obtain'd his Liberty, as a thing more profitable for him, *Exod.* 21. 26, 27. Also, if a *Magistrat* do smite a *Beggar*, it's not to be punished as a *Beggar's* smiting a *Magistrat* with Amputation of a Hand, or some greater Punishment; [As to which Cases, read *Cajetan* and *Willet* their Commentaries on *Exod.* 21. 24, 25, 26.] All which being considered, it could not be easie to fix upon a Case wherein simple Retaliation could be exactly inflicted by the Jewish Magistrats in a literal sense. All this agreeth to the Practice of other Nations, and if we were not here restricted to speak of Personal Injuries done to the Body, we could give many instances in the Jewish Law, wherein *Pythagorical Retaliation* was not observed, particularly in *Theft*, *Exod.* 21. 1, 5. where the *Thief* was to restore, sometimes the double, sometimes four-fold, and sometimes five-fold.

5. When the Pursuer and Defender among the Jews were persons of equal Quality, and otherwise equally Circumstantiated, and the case it self plain and free from aggravating Circumstances; (which is the only difficult Case, and seems to be the very Case that *Josephus* speaks of, as is mentioned N. 217. *supra.*) Even then, if the Pursuer insisted for Corporal Punishment, according to the letter of the Law; the Judge had Power to determine a Pecunial Recompence, which the Party injured was obliged to accept of; and the Delinquent who pay'd it was thereby freed from the Corporal Punishment. This Pecuniary Muilt was modified on five accounts, according to *Rabbi Cana* cited by *Paulus Voet.* §. 7. *inst. de injur.* of whose Doctrine he sets down a short abstract. As also according to *Rabbi Moses Maimonides* in his Treatise of *Hurts*, whereof *Ainsworth* in his Commentary on *Levit.* 24. 19, 20, 21. sets down a larger abstract. The Damage (says he) was modified: 1. For the lost Member. 2. For the lost Labour. 3. For the Pain and Trouble which the injured Party suffered by the Wound. 4. For the Expenses of the Cure. 5. For the mark of Ignominy and Deformation; where also he shews to what Sum the quantity of each Muilt extended; but neither *Voet.* nor *Ainsworth* speak of Corporal Punishment in their Abstracts. These things are written by the *Rabbies*, who best understood the custom of their own Nation, and had no interest to pervert the truth in matters of that concern. And this may serve for a sufficient proof to justify the common Opinion, *viz.* that GOD did not intend the Law of Retaliation should be literally executed; and that the *Rabbies* thought this manner of execution inconsistent with the Rules of distributive Justice, & that the observing the Rules of distributive Justice, satisfied the natural Equity of the Law. *Ne* (says *Vander Muelen dict. qu. 15. vers. fin.*) *scutica dignum horribili flagello scilicet; aut securis meritum scutica solvere cedamus*: And therefore



Pool, and other Divines on *Exod.* 21. 24. conclude, that this Law of *Retaliation* was only *Minatory*. But of this we shall have occasion to say more hereafter, when we come to our last *Argument*, taken from the Opinion of Divines in this Case. Mean time, we may take notice, that *Rabbi Moses Maimonides* in his Treatise of *Hurts*, cap. 1. sect. 3, 4. (as he is cited by *Ainsworth* on *Exod.* 21. 25.) ascribes the Opinion of *literal* and *strict Retaliation*, to the *Sadducees*, who affecting a strictness in execution of Laws, did therefore superciliously assume the magnifick Title of *TZADDIKIM*, or *JUST MEN*. *Hospin. de Orig. Monachat. lib. 1. cap. 4.* as if they (forsooth) were the only just and righteous men of their Nation : And they have not wanted Successors in Ambition, in almost every Age, who being guilty of gross Opinions (as the *Sadducees* were,) by Denying the Immortality of the Soul, and the Existence of Spirits, &c. have endeavoured to support their Reputation by their assuming some proud Title or another.

- 121 6. If the Pursuit was against a false Witnes, (who by his false Testimony had taken away the life of an innocent man) as *Deut.* 19. then the Punishment was certainly inflicted according to the precise letter of the Law, because he was guilty of *Homicide* ; but then the doubt yet remains, as to the loss of a Member, whether or not the false Witnes was to suffer *Retaliation* in a literal sense, and the ground of the doubt is from the words of the Text, *verses 19. & 20.* which command, that it should be *done unto him as he thought to have done unto his brother* : and that upon a Moral Reason, that evil might be removed from the people, and those which remain'd might hear and fear, and commit no more such evil : which refers to a custom the Jews had of publishing their Criminal Sentences in every City ; Further, it's there said to the Judge, *verse 21. Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot* ; and yet even in this Case, *Paulus Fagius* on the same Text of *Deut.* 19. says, *Hec lex talionis, autore Rabbi Kana ut à Bica citatur, nunquam observatur, nam præter scripturam ex traditione ait constari quod non oculus pro oculo sed æstimatio pecuniaria reddatur.* And *Ainsworth* on *Exod.* 21. 25. cites *Maimonides* his Treatise of *Hurts*, Chap. 1. Sect. 3, 4. to prove that the words *thine eye shall not pity*, relate only to the Case where Satisfaction was not made at the sight of the Judge ; but yet if the life was taken away by the Testimony of the false Witnes, then his life behoved to go, and he could expect no mercy, because he was like the man who lay in wait to kill his neighbour, and came presumptuously upon him to slay him with guile : and concerning such a man, GOD's expresse command is, *Thou shalt take him from mine Altar, that he may die*, *Exod.* 21. 14. And this may serve for proving the first *Argument*, taken from the Practice of the Jews.

- 122 Arg. 2. The second *Argument* to prove that the Law of GOD did not require *Retaliation* in a literal sense, arises from comparing that Law with the Laws and Writings of the *Grecians* and *Romans* on that Subject.

1. I begin with their Law of *Retaliation*, as it is in the seventh of the XII. Tables, *tit. de injur. cap. 4. l. 2, 4, 5.* and the last words of the sixth Law, with the Paraphrase of *Jacobus Gothofredus* thereon, who collected these Laws from *Aul. Gellius*, and other Roman Authors, and this should bear the greater weight, in that the *Grecians* who are said to receive them from the Jews, and the *Romans* who received them from the *Grecians*, had no interest to corrupt or alter this Law, or to distort it to a wrong sense, nor were tempted with the blind Zeal that misled them in Religious Worship. And so we have just reason to believe, that this Law, as it is in the XII Tables, is worded according to the true meaning of the Law of GOD, from which it was taken, as we said *N. 105. supra*, and may serve to illustrate the same.

Follow the words of the Text, with the foresaid Paraphrase, and the Scriptures in the Margin which correspond therewith.

Text.

Paraphrase.

The Examples after adduced, shew this was smiting on the Mouth.

1. 2. *de injuriis levioribus.*

SI QUINJURIAM  
ALTERI FAXIT XXV.  
ÆRIS POENÆ SUNTO.

Si quis injuriam levio-  
riorem, sive re, sive  
verbis, alteri fecerit,  
25. assibus multator.

Exod. 21. 24.  
Hand for Hand,  
Foot for Foot.

1. 4. *de pena talionis.*

SI MEMBRUM RUPSIT  
NI CUM EO PAICIT TA-  
LIO ESTO.

Si quis alteri mem-  
brum aliquod ruperit,  
ni cum eo pacisci ve-  
lit, membrum ei pa-  
riter rumpere injuriâ  
affecto jus esto.

Ibid.  
Tooth for Tooth.

1. 5. *de offe fuso, i. e. den-  
tibus excussis.*

QUI OS EX GENETALI  
FUDIT LIBERO CCC. SER-  
VO CL. ÆRIS POENÆ  
SUNTO.

Qui dentem ex gingiva  
excusserit libero homi-  
ni trecentis Assibus  
multator, qui servo  
150.

Deut. 19. 19, 21.  
Thou shalt do unto him  
as he thought to have  
done unto his bro-  
ther, and thine eye  
shall not pity, but life  
shall go for life.

1. 6. *de falso.*

SI FALSUM TESTIMO-  
NIUM DICASIT SAXO  
DEICITUR.

Si quis falsum testi-  
monium dixerit Saxo  
Tarpeo præceps deji-  
tor.

Now let us compare these Laws as Paraphrased, one by one, with what we have said N. 115. & seqq. concerning the Doctrine of the Jewish Rabbies, and we shall find an exact agreement betwixt the Rabbies and these Laws. For,

1. As the Rabbies acknowledge N. 117. *supra*, that the Jews might Transact; so the same is evident from the said 1. 4. *de pena talionis*, and these words thereof, NI CUM EO PAICIT, or as the Gloss has it, *pacisci velit*, that either a Transaction actually made by the Delinquent, or his being willing to Transact, as the Paraphrase has it, was sufficient to liberate him from the Corporal Punishment of the Law.

2. It appears from 1. 2. *de injur. leviorib.* such as *de palmarum* or smiting on the Mouth; that this was not recompens'd by *de palmarum*, but by payment of a Pecunial Sum, viz. xxv. *asses*. And this is that Law which Phavorinus *apud A. Gell. loc. citat.* objects to S. Cæcilius, telling him how the insolent and wicked Lucius Veracius (or as others read *Neracius*) baffled the Law, taking advantage from the smallness of the Penalty, to smite every man he met with on the Mouth, and thereafter to cause his Slave that followed him with a Bag of Money, to pay down the Ransom.

3. It appears by 1. 5. *de offe fuso vel dentibus excussis* that the Law of GOD, Tooth for Tooth, was not followed in the Literal and Pythagorical Sense, nor

could the Judge discern it in that Sense, because the Law limits him *ad penam CCC. assium*; if the Party injured was a free man, and to the half it, if he were a Slave, and this difference shows, that the difference of persons was observed.

126 4. And last of all, as the false Witness was punished by the Law *Dent. 19.* with Death, if by his false Testimony he had taken away the life of a man; so by the last of the Laws of these Tables, he was thrown over a Rock without Mercy. And even the later Law of the Romans, (although it has in many things derogated from the Law of the XII. Tables, according to *Ulpian. l. 1. ff. ad C. Aquil.*) yet it contains the Law of Retaliation against a false Witness, *Qui falsum testimonium dolo malo dixerit quo quis publico judicio rei capitalis damnaretur, l. 1. §. 2. ff. de Sicar.* which upon the same Reason was against false Accusers, both by the Civil Law, in *l. fin. C. de accusat. authen. sed novo jure. C. de adult.* and by the Canon Law, in *Caus. 2. q. 3. c. 2, & 3.* the words are, *Calumniator si in accusatione defecerit, talionem recipiat, qui non probaverit quod obicit penam quam intulerit ipse patiatur*; though *Clarus lib. 5. §. fin. q. 81.* proves, that this (as to Accusers) is abolished, *Ferd. Vasq. l. 2. controvers. cap. 18. N. 6.* wishes that the Pain of Retaliation might be punctually exacted from both Witnesses and Accusers, that Pleas might have an end. So that in this point of punishing a false Witness, the Jewish Law was not more strict than the Roman Law is.

127 2. As the words of the foresaid Law [*SI MEMBRUM RUPSIT NI CUM EO PAICIT TALIO ESTO*] according to *Gothofred's* Paraphrase, did admit of a Ransom, in place of strict Retaliation, when the Delinquent was willing to pay the same; so the Greek and Latine Authors, who liv'd at the time when this Law was in vigour, understood it in the same sense, as appears by the Reasonings of *Aristotle*, (a famous Professor of Philosophy in *Athens*, the chief Seat of the Grecian Learning,) against the *Pythagoreans*, *Arist. lib. 5. Ethic. cap. 5.* renewed by *Phavorinus* a Roman Philosopher, against *S. Cecilius* a Lawyer, *vid. Aul. Gell. lib. 20. cap. 1.* and summ'd up by *Matthews, dict. tit. de injur. N. 2.* from which we argue thus,

128 First, It must be granted (without considering the strength of their Arguments) that if they believ'd that strict Retaliation was impracticable in the matter of Bruises and Wounds, then the Law could not in their Opinion require a strict Retaliation in these Delicts, but this they believ'd; as is clear from the first Argument of *Phavorinus*, in these words, *If (says he, imitating Aristotle) a man, through chance or inadvertency, mutilat or maim a member of another mans Body, it will be impossible for the party lesed to take a casual or inadvertent Retaliation; yea, though the Injury be done designedly; it will be difficult (if not impossible) to make a Wound so equal to another as it shall neither be deeper nor broader, and the Judge will not be able to observe such precise measures as shall equally ballance and not exceed the Injury given. Moreover, if both parties should haply be in the wrong, and multiply Injuries to one another, and those of a different nature; it would be an unaccountable cruelty to raise a Suit for obtaining all these things to be done by way of Satisfaction and Retaliation, for so, infinite Reciprocations and Retaliations would follow to both parties.*

129 To these Arguments *S. Cecilius* makes answer (my dear *Phavorinus* says he) although one Member cannot be broken or bruised to the exact dimensions of the wound and bruise of another, yet Retaliation should not therefore seem unjust; for why? we should not require the same measure or nice ballancing of the stroke upon the same Member, with respect to all circumstances and accidents, for that cannot be done; but we should rather consider the intention of the Percussors mind,



mind, and if he acted of design, or by sudden passion; and seeing the Law permits Transaction to be made, and a Ransom to be payed, if in that case the Percussor will not redeem the Punishment, by payment of the Ransom, the Decemviri, Authors of the Law, allowed Retaliation to be exacted, whether the Delinquency was done by design, or by inadvertency; for what Cruelty, I pray you, can there be, if the same be done to you which you did to another, especially when you were allowed to transact and pay a Ransom, and no necessity lay upon you to undergo Retaliation, unless you your self had choos'd the same? And now, can any of the Edicts emitted by the Prætors, concerning the estimating of Injuries, be more just or approvable? Also, I would not have you ignorant, that the Judge necessarily behoved to reduce this Retaliation to an Estimat. For if the Delinquent, refused to undergo the Retaliation ordered by the Judge, then the Judge condemned him to pay a Sum of Money, as the Estimat of the Plea. Whereby if the Delinquent conceiv'd that the terms of Agreement, & the Punishment of Retaliation were both too hard; the Severity of the Law was taken off by the payment of a Pecuniary Mult.

And now seeing Phavorinus, whom S. Cacilius honours with the Title of <sup>130</sup> one vers'd in the Learning of the Academicks, thinks it was impossible to execute this Law by Identical or Pythagorical proportion: and that S. Cacilius himself yields to an Analogical proportion, as agreeable to the Law and Custom of the Romans; how can we think that this Law had any footing in the strict Sense, among the Romans, whose mind these Disputants their Countrymen, are presum'd to have understood? But

2. As the Dispute betwixt these two Romans, shews what was the Opinion <sup>131</sup> of that People at that time, even so the Arguments which Aristotle urg'd long before against Pythagorical Retaliation, shew that the learned Athenians (from whom the Romans receiv'd that Law) had always understood, & maintain'd it, according to the Rules of Distributive Justice, or Analogical Proportion. "Distributive Justice, says he, requires of Judges that they seriously consider the Circumstances of Fact, the Persons by whom and against whom the Crimes are committed. For if a Peasant should beat a Magistrat, or a Child his Father, or a Slave his Patron, certainly the Crime would deserve greater Punishment than if committed by the Magistrat against the Peasant, the Parent against the Child, or by the Patron against his Slave: and yet according to the Law of Pythagorical Retaliation, he must be equally punished who offers a Blow to a Prince, and to a Begger: And a Slave offering Violence to his Patron, and a Patron injuring his Slave, must suffer the same degree of Punishment; which to every man seems absurd: And on the same ground, if ye smite out the Eye of a Monoculus, you shall lose but one Eye by way of Punishment, whereas if the Monoculus smite out your Eye, he must be made Blind, tho' he made not you Blind: and if you having two hands, smite off the single Hand of your Neighbour, and thereby make him incapable to serve himself in the necessities of Nature, yet you shall lose but one Hand, and be still capable to serve your self with the other. Again, Distributive Justice, as it considers the person, so it diligently ponders Time and Place, and one and the same Crime, is not equally atrocious at all Times, and in all Places, as the Stoicks fancied, but increaseth and diminisheth according to the Time and Place of committing. Whereas if Pythagorical Retaliation hold good, then he who Wounds his Neighbour in presence of the Judge, and he who Wounds him in an obscure Vault, and he who Wounds him in a Church, or Palace of the Prince, and he who Wounds him in a Tavern or a Brothel-house; must suffer alike Punishment. Moreover, if strict Retaliation take place, then if Claudius Pompeius commit Adultery with Casars Queen, Cesar may retaliate by committing Adultery with the Wife of

## 44 Of Mutilation and Demembration,

"*Claudius*, which is contrary to the rules of Morality; and if *Caesar* steal  
 "1000 weight of Gold from the Thesaury of the People, they may retaliate  
 "by robbing the Coffers of *Caesar*; and if *Albinus* reproach *Modius*, *Modius*  
 "may in *Retaliation* revile *Albinus*, which were to be guilty of a sinful sort  
 "of *Retaliation*, and may take place according to *Pythagorean* Doctrine, not  
 "only in Adultery, Theft, and Reviling; but in Witchcraft, Sacrilege, In-  
 "cest, violation of Sepulchres, Calumniation, Prevarication, supposititious  
 "Births, and all manner of Villanies; whereas all these Inconveniencies may  
 "be shun'd, by observing the rules of *Distributive Justice*.

132 And now having given an account of these Debates, to prove matter of  
 Fact, to wit, that the *Grecians* and *Romans* did believe and practise the Law  
 of *Retaliation*, in an *analogical* sense, at the times when these Debates were  
 managed; I shall now subjoyn some Considerations for preferring the *Autho-  
 rity* of *Aristotle*, before that of *Pythagoras* and his followers: As, First, The  
 Question was about the sense of a political Law; which *Aristotle* is to be pre-  
 sum'd to have understood better than *Pythagoras*, because he learn'd the know-  
 ledge of Law from *Plato* his Master, who wrote *de legibus*; and *Menochius*  
*proem. de Arbitrar. N. 3.* calls him the learnedst of *Plato's* Disciples. 2. *Aris-  
 totle* being a Professor of Philosophy, and a constant Residenter at *Athens*, and  
 having written well on the Politicks, its presum'd he understood the Laws &  
 Customs of *Athens*, better than *Pythagoras* did who resided long among the  
*Aegyptians* with *Amasis* their King. 3. Its probable that *Pythagoras* learn'd the  
 first Principles of *strict Retaliation* from the *Aegyptians*, where he also learn'd  
 the foolish Opinions of the *Metempsychosis* or Transmigration of the Souls of  
 Men into Beasts and Plants, and the idolatrous Doctrine of worshipping the  
 Sun and Moon. 4. *Pythagoras* seems to have had little Authority among the  
*Grecians*, because he was mocked by divers of them. *Timon* in his *Silli* re-  
 proaches him for his Magical Arts, and hunting after the Praise of Men, without  
 merit. *Xenophanes Cratinus* derides him in his *Pythagorazusa*, and *Alexis* in  
 his *Tarentines*, for his ridiculous Conclusions and scholastick Toys; and could  
 there be a more ridiculous Fancy, than his adoring of Beasts to that Degree  
 of Superstition, that he choos'd rather to be kill'd than make his escape, by  
 trampling on them when pursu'd: more of his Follies may be found in his Life  
 written by *Diog. Laertius*. 5. His absurd Doctrine of Communication of  
 Goods, need'd *strict Retaliation* to defend it against the Janglings which such a  
 Doctrine would produce; and his affecting the Name of a strict Justiciar,  
 might be another cause to defend *strict Retaliation*. Lastly, the learned *Rive-  
 tus*, *Wallens*, *Matthaus*, and many other Divines and Lawyers, prefer the Ar-  
 guments of *Aristotle* and *S. Caelius*, before these of *Pythagoras* and *Phavorinus*.

133 It's true indeed, that *Bodinus lib. 6. de repub. cap. ult.* takes a way of his  
 own, and censures both *Aristotle* and *Phavorinus*, as if they had mistaken the  
 meaning of *Pythagoras*; and for this *Bodinus* himself is as severely censured  
 by *Matthaus dict. c. 4. N. 3. in fin.* But, for all this, he acknowledges that  
*strict Retaliation* was never practis'd in the Cities of the *Jews*, and cites *Mai-  
 monides*, and the words of *Rabbi Kana* to prove it:

134 The only thing which seems to gravel *Bodinus*, (and which, as *Matthaus* ob-  
 serves, is neither cleared by *Aristotle* nor *Phavorinus*) is whether *strict Retal-  
 iation* was in use where the Offender and Offended were in equal Circumstan-  
 ces; as for example, a Peasant demembring a Peasant in a privat place, &c. but  
 this is no difficulty, and *Aristotles* Arguments drawn from Circumstances, are  
 still pungent against identical *Retaliation*, upon this ground, that if the Law  
 had required it in cases of equal Circumstances, it would have distinguished  
 betwixt a simple and circumstantiated Case, and would not have determined  
 the

the same Punishment in the general, which could be neither just nor possible in all cases.

We cannot deny but some of the Oriental Nations, and particularly the *Locrians* did exact *strict Retaliation* for the *Eye*, and we have a remarkable Case in *Diod. Siculus lib. 12*, which happened to be pleaded upon the Law of *Charondas*. *Si quis cui oculum eruerit, oculum reo pariter eruito*. A *Monoculus* had his Eye smitten out, the *Delinquent* had one of his Eyes taken out by way of Recompense, but the *Monoculus* thinking that Punishment not sufficient, brought the Case before the *Assembly of the People*, and demanded the other Eye also; the *Delinquent* alledged, that he had satisfied the Law by the loss of one of his Eyes; the *Plaintiff* replied that the *Delinquent* ought to be made blind since he had made him blind, and because the Law did not ordain it, he crav'd the Law might be rescinded, and another made more strict: and, according to the Custom of the Place, came with a Rope about his Neck ready to undergo the punishment of being hanged therewith, in case his Desire should be rejected, and so far prevail'd that the former Law was corrected. This account is also given by *Plato*. But though all this be true, yet it proves not a general practice of *strict Retaliation* in all cases; for, if that had been, then the Law would not have run *singly* as to the Eye, but in general Terms. Moreover, the Prohibition (which *Aerodius* mentions) holds forth, that the Law was made with a singular respect to the Eye, for its excellency and usefulness to the Body beyond other Members; and for this cause 'twas that *Justinian* reckons the percussion of the Eye among atrocious Injuries §. 9. *Inst. de injur.* and *Charondas* did no more than *Christians*, who condemn *strict Retaliation*, have done: we have a proof in the words of *St. Augustine Epist. 159. ad Marcellin.* (cited by *Gratian Caus. 23. q. 5. C. circumcellioner. 2.*) where he relates that he himself interceded with *Marcellinus*, that the *Donatists*, who were arraigned before him to be punish'd for whipping a Catholic Priest, and putting out one of his Eyes, and cutting off one of his Fingers, might not be punish'd by *strict Retaliation*: and thence it seems that *strict Retaliation*, for such atrocious Facts, was in use in his time. The same is prov'd by *Novel. 92. of Leo the Emperour*: and by the Decision of *Charles the fourth against Zachora*; cited N. 24. *supra*, and by *Novel 142: of Justinian* ordaining *Castration* to be punish'd with *Castration*.

And this may suffice for our second Argument taken from comparing the Law of GOD, with the Laws and Writings of the *Grecians* and *Romans*, on the Subject of *strict Retaliation*; to prove the Conclusion formerly laid down, that although Retaliation in the general be founded on natural Equity, yet its still to be understood as admitting of satisfaction by *analogical* and *geometrical* proportion.

*Argument 3.* To prove the same Conclusion, shall be taken from the Authority of Divines and Lawyers. I begin with *Grotius*, because eminent in the knowledge of the Jewish and Christian Theology, and the political Laws of both: this learn'd Author *lib. 2. de jure B. & P. Cap. 20. N. 1.* having acknowledged the natural Equity of the Law of *Retaliation* in these words; *Among these things which natural Instinct tells us are lawful and not unjust, this is one; ut malum qui facit, malum ferat, that he that doth evil should suffer evil: which Philosophers do reckon as the most ancient and most perfect rule of Justice, or as one of the Laws of Rhadamanthus, yea so ancient and indubitable, that Plato was so bold as to say, that neither the Gods nor Good-men durst never say otherwise, but that he that doth wrong deserves to suffer for it.* He after all this, N. 10. speaking of the same Law of *Retaliation*, and how far *Christ's* words *Matth. 5. 44. you have heard it said an Eye for an Eye, &c.* make an alter-



ration of it; and having also insisted upon some passages concerning it, taken from St. *Augustine* on *Plal.* 108. and *Tertullian*, he thus concludes: By this of *Tertullian* we may see that it is not only unlawful for a Christian to exact this Law of Retaliation, but that it was not tolerated among the Hebrews, as a thing simply and in it self commendable; but only for the prevention of a greater Evil. Thus also doth S. *Chrysostome* on *Ephes.* 4. 13. expound that Law of Retaliation, Therefore doth Christ urge that Law of *Moses* an Eye for an Eye, and a Tooth for a Tooth, *ut illius manus cohibeat, non ut tuas excitet contra*, to restrain him that offers the wrong, not to provoke thee to revenge who sufferest it; not only to preserve thine Eye, but to keep his also safe. And again, The most learned among the Hebrews did not apprehend it in that latitude; for they respected not so much the words of the Law, as the Reason of it, and the intent of the Lawgiver. And at some distance says, For even the Jews themselves (as *Josephus* tells us) besides the Costs and Charges of the hurt done, whereof we have a distinct Law *Exod.* 21. 19. did usually buy off their Talio with a Sum of Money. The like they did at Rome, as *Favorinus* in *Gellius* testifies. In these last words he makes the Parallel betwixt the practice of the Jews and Romans; and we have shown that the Romans did never exact strict Retaliation, unless in atrocious Cases. St. *Aug.* l. 19. c. 25. *contra Faust. Manich.* calls the Law of Retaliation, *non fomes sed limes furoris*, to shew that it was not design'd for exacting strict Retaliation, but to restrain the Jews from privat Revenge, by which they were in use to redress themselves before the Law was made. And *Grot.* dic. c. 20. §. 8. in fin. relating to the after Custom, says, The Hebrew Law permitted the Kinsman of him that was murdered, to kill the Murtherer with his own Hand, in case he overtook him without the Cities of Refuge. And it is well observed by the Hebrew Doctors, that a Kinsman might exact the Law of Retaliation with his own hand for the person killed; but for himself, if any violence was offered him either by Wounds, Mutilation, or otherwise, he was to make his Appeal to the Judges; because it is a very difficult thing to moderat our Passions, when they are excited by our own personal Grief.

<sup>137</sup> *Goodwyn*, famous also for his Knowledge in the Jewish and Roman Antiquities; in his *Moses and Aaron* lib. 5. cap. 8. says, that the Hebrews understood not *talionem identitatis, vel Pythagoricam*, but *similitudinis, vel analogicam*, which was when the price of an Eye or some proportionable Mult was payed; & that it's impossible to punish one Maim with another: And for this he cites *Targum Jonath.* on *Deut.* 19. 21. And *R. Sol.* *ibid.* Further he cites *Munster* on *Exod.* 21: affirming that the Hebrew Doctors say, that the Party offending was bound to a five-fold Satisfaction. 1. For the Hurt in the loss of the Members. 2. For the Damage in loss of his Labour. 3. For his Pain or Grief arising from the Wound. 4. For the Charge in curing of it. 5. For the Blemish or Deformity thereby occasioned, [and this agrees with what was formerly cited out of *Maimonides* by *Ainsworth*, N. 120. *supra.*] And says, that *Munster* rendereth these Five thus; *Damnum, Sessio, Dolor, Medicina, Confusio.*

<sup>138</sup> And the Testimony of the Jews hath the more weight, in that they were most tenacious of their political Laws, & strict in the literal observing of them, particularly of that *Deut.* 21. 2. concerning one found slain in the field, as *Ainsworth* out of *Maimonides* in his Treatise of Murder, cap. 9. sect. 4. 9, 10. & *Selden* de *Syned.* lib. 3. c. 7. relate; And surely they would have been as strict in the execution of the Law of Retaliation, had they not certainly known that an analogical executing thereof was sufficient, & that it was made *magis ad terrorem quam damnationem*, and to hinder the Party injured from taking Revenge. *Isid.* *Pelusi.* lib. 4: Epist. 96.. cited by *Rivet* on *Exod.* 21: 24: speaking of Eye for Eye, says, *quod lege hac tantum est, nec est crudele neq; immane; sed siquidem is sensus qui prima fronte accipitur justitia plenum est; si vero interior sensus expendatur etiam humanitate referuntur est, nam ut cum qui alteri quid inique facere*

*cere meditatatur, compescat metu similis perpeffionis, & ita improbitatem reprimat, ideoque hoc iure meritoque ita sancivit.* The end and design of their Law being, non ut libidini populi indulgeretur, sed ut qui ad injuriam inferendam proni erant, talionis metu, coercerentur. As Rivet expresseth it on Exod. 21. 24, 25.

Further Godwyn says from *A. Gellius. lib. 20. c. 1.* that the Romans likewise <sup>139</sup> had a Talio in their Law, but they also gave liberty to the Offender, to make choice whether he would, by way of Commutation pay a proportionable Mult, or in identity suffer the like Maime in his Body. And here we may observe that he takes the Testimony of *S. Cecilius*, as a proof of the custom of the Romans, as the other DD. who cite that Dispute, do.

*Paulus Fagius* on *Deut. 19.* says, *Hæc lex talionis antere Rabbi Kanan, ut a 140* *Bachi citatur, nunquam est observata. Nam præter scripturam, ex traditione ait constare, quod non oculus pro oculo, sed æstimatio pecuniaria reddatur alioquin enim legi non satisfaceret, quæ ait, quemadmodum dedit maculam in hominem, sic detur in autorem, Levit. 14. jam patet, Exod 21. quod de interesse & sumptu in medicos factæ, satisfacere læso, qui damnum dedit, tenetur. Quod si auctori oculus pro oculo effoderetur, quis illi satisfaceret? Est & alius tenerioris Constitutionis quàm qui læsus est, qui ex equali vulnere similiter mortem bierit. Propterea fieri non potest, ut per omnia vulnus & læso aqualis auctori infligatur.*

The Reader may also peruse these Divines following, viz. *Episcop. inst. l. 141* *3. sect. 2.* and *Pool* in his Critiques following him: as also *Pools annotat. on Exod. 21. 24.* See also *Simlerus, Willet, Cajetan, a Lapide, Chytraus* and *Rivet*, on *Exod 21. 24.* *Lorinus* (most amply) in *Levit. 25. 19. 20.* *Maldonat* in *Math. 5. 38. 39.* *Ant. Wallam, oper. tom. 2. p. 290. Col. 2.* all absolutely condemning *Pythagorical Retaliation.* And if we turn over all the Divines, whether Ancient or Modern, Reformed or Romanist, in their Commentaries and other Writings, we'll find all, few or none excepted, agreeing to an *analogical Retaliation*, and affirming that the exacting of strict and *literal Retaliation*, was never intended by the Law of *Moses*. And the most that some Divines grant, is, that *identical Retaliation* may be crav'd in a Libel, thereby to force the *Delinquent* to a Transaction.

To conclude this Argument taken from the Authority of Divines: As the *Sad-* <sup>142</sup> *duces*, did patronise *identical Retaliation*, among the Jews, & were none of the foundest of their Sects; even so the *Manichees* were it's Patrons under Christianity, (as may be seen by *S. Augustine* in his Disputes *contra Faustum. l. 9. c. 25.* and *Adimantum. Manichæos*; and by *Irod Pelusius. Epist. l. 2. Epist. 133.*) of whom it hath no Reason to glory, for these *Manichees* were the most wicked of all Hereticks in the Church, and are classed by *Theodosius* the Emperor, *l. 5. c. de Heret.* in the Rere of a black Tribe of the worst of them, with this Stigma: *Manichæi qui ad imum usque scelerum nequitiam pervenerunt*, and for that cause he commanded them to be banished out of all Cities, and some to be punished with death.

As *strict Retaliation* is condemned by the Divines, so also by the generality <sup>143</sup> of Lawyers: viz. *Hottoman, Vultæus, Harprecht, Bachovius, Vinnius, PVoet*; and several others: in their Commentars on these Words of *§. 7. inst. de injur. pena autem injuriarum ex l. XII. Tab. propter membrum quidam ruptum talio erat*; all of them agreeing to the Sense put upon the Law by *S. Cecilius*, and to *Aristotles* Arguments against *Pythagoras*. To these add *Mynsinger* on that Text, who says expressly, that that learned Disput berwixt *Phavorinus* & *S. Cecilius*, hath brought much light to this matter, because it shews that the *Delinquent* was lying under no necessity to undergo *strict Retaliation*, in that he had the power to redeem; And *Gudelinus de jure Noviss. lib. 5. l. Cap. 15. n. 14.* asserts that the Law was impracticable, if taken in a strict Sense; being convinced by the Arguments

of S. *Cacilius* and *Aristotle*. The like is to be observed from *Jacobus Gothofredus*, in *font. jur. civil. lib. 2. cap. 7. quo commendatio legis XII. Tab. continetur*; Where having cited *Cicero*, *Tacitus*, *Livius*, *Crassus*, *Diod. Siculus*; *Dionys. Halicarnassensis*, to prove the Equity of the Laws of the XII. tabb. he sets down the whole Dispute betwixt *Phavorinus* and S. *Cacilius*, to shew that he embraces the Law of Retaliation no otherwise than as S. *Cacilius* expounds it, and for that Cause his Paraphrase on these words, *Ni cum eo paicit, is vel pacisci velit*, as we have formerly noted.

And whereas some of these Lawyers, in the places above-cited, say that in the case of Demembration, the Punishment was *M. membrum pro Membro*, they are still to be understood as the like words in the Law of GOD, and the XII. Tab. that is to say Redeemable, upon a ransom to be modified by the Judge, where the Profer of the Delinquent was too low, or the Demands of the injured Party too high; like the case *Exod. 21. 22.*

144 And all these D D. Divines and Lawyers who have cited that famous Conference betwixt *Phavorinus* and S. *Cacilius*, and founded their Opinion on it, have done so with no less Reason to prove the Custom of the Romans, than they founded on the Testimony of *Aristotle* to prove the Custom of the Grecians. For 1. The Controversy betwixt these Colloquutors was concerning the sense of the Law of the XII Tables, which *Phavorinus* (though eminent for Learning) had mistaken and charg'd with Obscurity; and S. *Cacilius* was well vers'd in the Knowledge of them, as you may see by his Answer to *Phavorinus*, in these words *Obscuritates legum non assignari debere culpæ scribentium, sed inscitiae assequentium*. 2. S. *Cacilius* was generally vers'd in the Knowledge of Law; as you may see by the Characters he receives from divers persons; *A. Gellius* relating that Conference, has these words; *in disciplina juris atque legibus Pop. Romani noscendis, interpretandisque scientia, usu, auctoritateque illustris fuit*. *Justinian* calls him *juris antiqui conditor*. l. 1. prin. c. de communi servorum manumitt. *Papinian* and *Ulpian* approve his Writings; in l. *Titio centum 71. ff. de condit. et demonst. l. prospexit*. 12. §. 6. qui et a quibus manum. l. si postulaverit 28. §. si liber 5. ff. ad leg. in l. adulter. See *Bertrandus* in his Life. Lastly, *A. Gellius* himself who records the Conference, was a learned man and contemporary with these Colloquutors, and convers'd with them about the year of Christ 143, which was the year in which *A. Gellius* wrote, as you may see in the Account of his Life written by the Author of the Notes on him in *usum Delplinii*; And in his third Note on that Conference, where he rectifies an Error of Chronology that had crept in to the Text, making that Conference to be many years thereafter.

145 So that by all that is above-said, it appears that the Law of Retaliation was never executed in a Pythagorical or Arithmetical Proportion among either Jews, Grecians or Romans, but according to the geometrical and analogical Proportion; with respect to Circumstances that accompanied the Crime. and that the payment of a Ransom for Damages was always admitted: Except the Obstinacy of the Delinquent had given occasion to the contrary; or that there had been a special Law upon a special occasion; or with respect to some particular Member, as the Eye, &c. Which I doubt not, may happen in many Kingdoms, and give occasion to the Variation of Laws. See *Caroli du Fresne, glossarium*, on the word *Talio*. And therefore the Libel of Mutilation 28. July 1647. *Forbes* of *Leslie* against *Menzies* of *Pitfodds*, craving strict Retaliation for the breaking of a Leg, was ill founded; and no doubt if it had come to a Determination, as it did not, the Judges would have refused the desire of it, in respect of the Answer made thereto, setting furth that strict Retaliation was not in practise: And indeed, it's more agreeable



able to Christian Meekness, pressed by our Saviour, *Matth. 5. 39*: To be content with moderat Damages. Concerning which I recommend the Reader to *Grotius de jure B. & P. lib. 2. c. 20. N. 10.* where he particularly treats of what the Gospel requires in this matter: and *N. 36.* he proves, that unless there be urgent Causes to exact the Severity of Laws we should incline to mitigate Punishments; "For herein, *says he*, consists one part of Clemency, "the other consisting in their total Remission.

I come now to answer some Objections which occur to me.

*Obj. 1.* If strict Retaliation was not enjoy'd among the Jews, then there <sup>146</sup> was no place left for the Exhortation to Christian meekness, or to remitting the Punishment of Eye for Eye, *Mat. 5. 38.* I answer, there was still place for the Exhortation, because the Party injured might always insist for the strict Punishment, but the Judge was not obliged to grant it, except when the Delinquent brought it on himself by refusing to pay the Ransom; and even the Ransom it self might be heavy on some, and so require a total Remission or Mitigation by the Rules of Christian meekness, as we have just now said.

*Object. 2.* *Ulpian in l. 1. ff. ad leg. Aquil. says, Lex Aquilia OMNIBUS LEGIBUS, quæ ante se de damno injuria loquuta sunt, derogavit; sive XII Tab. sive alia quæ fuit.* By which word *Derogavit*, he means the taking away a part from every one of these Laws, while another part remain'd: for so the word *Derogare* signifies, in opposition to *Abrogare*, or total Rescinding *l. derogatur 120 ff. de verb. signif.* Now you'll ask what part could be taken from the Law, *si membrum rupsit, ni cum eo paucit, talio esto* (which was one of the chief Laws of the XII Tab. *de injuriis*) except strict Retaliation? for analogical Retaliation by paying a Ransom, remained long thereafter; as we see in the Answers of *S. Cæcilius* to *Phavorinus*, who flourished about the year of Christ 143, as we noted before.

I answer, That although *Ulpian* speaks in general, of derogating from all <sup>147</sup> the former Laws, yet he meant only of the plurality; and that way of speaking is very usual, and must be admitted here, or otherways his words will be false. We have Instances in the Collection of the Laws of the XII Tab. made by *Dionysius Gothofredus*, to prove that some of these Laws were not derogated from, but rather strengthened by addition of new Actions; e. g. in *Tit. 10. dist. fragm. Actio noxalis adversus Dominum ex noxia sive delicto servi*, was propos'd in these words, *Si servus furtum faxit noxiamve noxuit; & Ulpian repeats it in l. 2. § 1. ff. de noxalib.* Now the *Lex Aquilia* introduc'd a new Action *ex eadem causa*, and yet it was still in the Option of the Party injured, to make use of either the old or new Action at his pleasure, because they were not contrary the one to the other; and therefore the one did not derogate from the other, but it was lawful to pursue the Damage upon either of them; *dist. l. 2. § 1. ff. de noxal. l. Quæcunque 56. ff. de oblig. & actionib. l. familia 5. ff. Si familia furt. feciss. § sunt autem 4. Inst. de noxalib.* A second Instance is, in *Tit. 24. §. 8.* of the said Fragments, where there's a Law set down taken from *Plin. 17. l. 1. Fuit & Arborum cura legibus, cautumque est XII Tab. ut qui injuriâ alienas arbores cecidisset, luerat in singulas æris 25.* And there is not a word in the *Lex Aquilia* any ways derogating from it, or from the Action founded on it; but, on the contrary, there is a Text in *l. in duobus. 28. §. Colonus 6. ff. de jure jurand.* allowing this *Colonus* to be pursued, for transgressing that Law; either upon the Law of the XII Tab. or upon the *Lex Aquilia*, or upon the Interdict *quod vi aut clam*; and being pursued to defend himself *per exceptionem juris jurand.* But still it appears that nothing by these new Actions was derogated from the old; and even so the *Lex Aquilia* makes no Derogation from the Law, *Si membrum rupsit*; only it grants

a new Action to a Freeman, as well as to the Master of a Slave, for Dam-nages done to him by wounding; not *Actio directa*, (for that is not com-petent in this or in any other case *ubi desunt verba legis*, nor doth the Law allow it to a free or ingenuous man, but expressly denies it to him; *Quia non est dominus membrorum suorum, neque ulla liberi corporis aestimatio est, l. liber homo. 13 ff. ad leg. Aquil.*) but *Actio utilis* to recover the Expense of the Cure, Damages for the loss of Time, &c. by the same Reason, that it's allowed to a Father to pursue for the Damages incur'd, when his Sons Eye is struck out by a Tradesman, to whom he is Apprentice; or by a School-master to whom he is a Scholar, *l. 5 §. ult. Verf. Pro-ponitur, et l. 6. & 7. ff. diſt. Tit.* And it was in the Option of the Pursuer, in this Case, as well as in the two former Instances of the XII *Tabb.* to make use of the *Actio utilis, ex lege Aquilia*; or of the Action that was former-ly competent upon the Law of the Table *si membrum rupsit*: And we see by the Conference that the first Action was then made use of; or otherways the Objection of *Phavorinus*, and the Answer given by *S. Cæcilius* concerning the Prætor's modifying the Ransom in place of strict Retaliation, had been to no purpose.

148 Further, it will appear by the following Accompt of time, that the Actions, *ex Leg XII. Tabb.* & *ex leg. Aquil.* endured for hundreds of years together; after the date of the *Lex Aquilia*: And because the date is uncertain, we must make our best Conjectures about it from the Age of those that cite it, and by comparing it with the Conference betwixt *Phavorinus* and *S. Cæcilius*: Now the Conference having been *Anno Chr. 143.* or thereby, as we shewed *N. 144. supra*; and the *Lex Aquilia* having had a Being in the time of *Brutus* (who cites & decides a Case by it in *l. si Servus 27. §. Si mulier ff. ad leg. Aquil.*) which *Brutus* was coæval with *P. Mutius Scævola*, Father to *Q. Mutius Scævola*, as may be seen by the words of *Pomponius* commending them, as Founders of the Civil Law about the same time; in *l. 2. §. 39. ff. de orig. jur.* And *P. Mutius* having been Consul with *L. Calphurnius Piso*; *anno U. C. 620.* as *Dion. Gothofredus in fastis consularibus* asserts, (which in all probability was about the time he cited the *Lex Aquilia*, he having not writ-ten till he was of Age;) it follows that the *Lex Aquilia* had endur'd (from the time of this Consulship to the time of the foresaid Conference) 274 years; supposing the Conference was *A. Ch. 143.* when *A. Gellius* wrote it. 'Twill then follow, that during all these 274 years, the Action which arose *ex leg. XII Tabb. Si membrum rupsit*, endur'd with the *Actio utilis* introduc'd by the *Lex Aquilia*. Another Accompt may be made from the time of *Q. Mutius Scævola*; (but it will not go so far backward) this *Q. Mutius* likewise cites the *Lex Aquilia*, and decides a case by it *l. 39. ff. ad leg. Aquil.* Now to find out the time wherein *Q. Mutius* liv'd, we must consider that *G. Aquilius* was his ordinary Hearer; for so says *Pomponius, diſt. l. 2. §. §. 41. 42.* and the time of *G. Aquilius* must be found out by his conjunction with *Cicero*, who in *topicis* calls him his Familiar and Intimat: now *Cicero* (according to *Dion. Gothofredus, in diſt. fast.*) was Consul with *C. Antonius, anno U. C. 690:* And if we should grant with *Vulteius* and *P. Voet.* that *G. Aquilius* was the Author of *Lex Aquilia*; yea, further, which they do not say, that he made it in the year of *Cicero's* Consulship (which is evidently false, being cited by *Brutus* 70 years before) even then, the Interval betwixt this Consulship, and the year of the foresaid Conference, will be 204 years; In all which time both the foresaid Actions continued. And hereby it's evident, that the Law of the XII. *Tabb. Si membrum rupsit*; was none of these Laws which was derogated from by the *Lex Aquilia*; but rather is to be excepted from the general words of

of Ulpian; *Lex Aquilia omnibus legibus, quæ ante se de damno injuria loquuta sunt, derogavit*; *sive XII. Tabb. sive alia quæ fuit.* And so the Objection, founded on these general words of Ulpian is fully answered.

This Calculation which I have insisted on, is not obvious to every person, and may be diverting; withal it may furnish Conjecture that M. Aquilius, Grandfather to G. Aquilius was the Author of the *Lex Aquilia*; because he was before Brutus who cites it, and decides by it. Now M. Aquilius (according to Suarez. *ad leg. Aquil. apparat. cap. 1. N. 11*) having been Consul anno. U.C. 625. and before that having been *Tribunus Plebis*; might then have been Author of that Law, which was *Plebiscitum*; *ut in dict. l. 1. ad leg. aquil.* though with other *plebiscita* it has obtained the Name of a Law *ex lege Hortensia*. But Dion. Gothofredus in *fast. Consul.* makes M. Aquilius to be Consul with C. Marius, A. U. C. 651. which doth not alter the case of his being Author of the Law; because he might have been *Tribunus Plebis*, before the time that Jo. Suarez makes him Consul; I say this only furnishes a Conjecture, for I do not presume to be positive, where the learned Noodt. *ad d. l. 1. Aquil. cap. 1.* And Jo. Suarez (to whom I am beholden for this Calculation) *dict. loc.* plead no further certainty, than that one of the Tribe of the Aquilii was the Author. Further, Suarez thinks it was made *circa annum U. C. 621.*

Before I enter upon Arbitrary Punishment, (which is the true Punishment of Mutilation and Demembration) I shall according to the Method I propos'd, speak a little to the Question, how far these Crimes may be punished with Amputation of the Hand which gives the stroke? And this falls naturally in here; because if the Demembration committed be of an Hand, then the Punishment will be Retaliation upon the Matter, though not of Design.

I suppose it will be granted, that, albeit we allow not of cutting off the Hand by way of Retaliation, yet, its in the power of the Law-giver to make a Law for punishing certain Crimes, by cutting off the Hand of the Delinquent; There are many instances in the civil Law, as in *l. 3. & Auth. seq. c. de serv. fugit.* A Slave deserting and running over to the Barbarians, is punished in that manner. [where you may observe that the Amputation of the Foot (which was the delinquent Member) contained in *dict. l. 3.* is changed by the Authentick into the cutting off of the Hand] as also in *Novel. 17. cap. 8.* the punishment of Amputation of the Hand, is appointed for the Exacters of Tribute, who express not in their Books, the Quantities receiv'd; the same was the punishment of Writers of Heretical Books, *Novel. 42. c. 1. §. 2. in fin.* and of the Writers of false Instruments, *Gloss in dict. Authent. & Arg. dict. cap. 8.* These two last were the proper Crimes of the Hand, which made the punishment the more agreeable: But withal it deserves our Observation, that this punishment was to be inflicted with much tenderness and previous Consideration; and never to have place against both hands, *dict. Auth.* nor against the useful hand, if the Delinquent had a withered Hand. *Novel. 134. cap. 13. Cabal. Cent. 3. resol. cas. 136. N. 52. & seqq.* The Reason which moved Justinian to this tenderness, may be taken from the *Novel. 134. cap. quia vero* to be this: That a Man mutilated of both hands could not serve himself to the necessities of Life, and therefore Amputation of both hands was never to be inflicted, but when Death was conjoyned as the Merit of the Crime.

The like Punishment is among the later Laws of Saxony and other Nations. *Carppz. prax. crim. p. 1. qu. 40. N. 40. & seqq. & p. 3. qu. 229. N. 24.* but it is always conjoyned (says he) with Relegation; to prevent Quarrels and other Inconveniencies which might follow upon Peoples shunning the Converse of the Delinquent, as bearing a publick Mark of Infamy on his Body. *dict. qu. 40. 45. & dict. qu. 129. N. 24.* It's frequently used in Aggra-



variation and Augmentation of the punishment of Death, as he relates, *diſt. qu. 128. N. 35 & ſeq.*

153 But to leave this uncontroverted Point, and to come to the preſent Queſtion, *viz.* If *Amputation of the hand* be a puniſhment appointed for *Mutilation and Demembration*? we have an Argument for the Affirmative in *Gloſs ad lib. 2. feud. tit. 53. de pace tenenda §. homicidium.* There it ſaid (by the Emperour *Frederick* the firſt of that Name, according to *Eguin. Baro.*) *Homicidium quoq; & Membrorum deminutio, vel aliud quodlibet delictum, legaliter vindicetur.* Upon which words [*Membrorum deminutio*] the Gloſs in *marg.* ſtates a Queſtion, *Membri amputatio qua pena puniatur?* And answers, *forte manus delinquentis amputabitur, cum pro ſolo vulnere manus ei amputaretur, ſi pacem violaverit,* and cites for this, § 3. of another Conſtitution of the ſame Emperour *de pace tenenda tit 47. diſt. lib. feud.* The words whereof are *Si quis alium, intra pacis editum, vulneraverit, niſi, quod in duello & vitam ſuam defendendo hoc fecerit, probaverit; manus ei amputaretur.*

154 The Argument of the Gloſs may be form'd in this manner: If *Amputation of the hand* be inflicted for ſingle *Vulneration*, then much more, for *Demembration*, but the firſt holds good and therefore the ſecond. The Conſequence of the Propoſition may be inforced from the Opinion of *Suarez. de cenſuris diſp. 44. ſect. 2. N. 4.* where he lays down for a Rule, “That  
“a Law though conſtaining rigour may be extended from *Mutilation* to *Homicide*, not by reaſon of Similitude in the caſes, or by an Argument drawn  
“from the leſſer Crime to the greater, but by an Argument drawn from a part  
“to the whole including that part; and ſubſumes that *Homicide* includes *Mutilation* as a part of it *formaliter vel eminenter*; and juſt ſo *Demembration* or  
*Mutilation* includes wounding; and therefore the puniſhment of ſingle wounding may by conſequence be extended to be the puniſhment of *Mutilation* or *Demembration*; But the Argument, as its form’d, will only conclude in the caſe where ſimple wounding, is puniſhable, *pena amputationis manus*, by *Frederick’s* Conſtitution; and that is only when the wounding is accompanied *cum violatione pacis publicæ*; to which *Gail*, (treating of this and other Conſtitutions of that nature, *lib. 1. de pace publica, cap. 7.*) & *Carpz. diſt. qu. 40. N. 1. 2. 3. 4.* following him, require three Conditions, *viz.* 1. That there be publick Force, and greater than one can reſiſt 2. That the wounding be with Arms; by which *Gail. diſt. cap. N. 3.* underſtands every hurtful Weapon or Inſtrument; as Sword, Spear, Batton or Stones. 3. That there be *dolus verus*, and a formed and deliberated Deſign to hurt. And it will be eaſily granted that ſimple wounding in theſe Circumſtances may be puniſhed with amputation of the Hand, which holds in other Circumſtantiated Caſes, *ex gr. ratione loci*, with reſpect to the place where it’s committed. And this is clear from *Carpz. diſt. qu. 40. N. 30, 31, 34, 35, 36, and 37.* where he ſhews that by the Laws and Practice of *Saxony*, all manner of Hurting, Wounding, or Inwading; being committed in the Camp, Caſtle, or Palace of a Prince; or upon a publick way, by one lying in wait, is puniſhable *pena amputationis manus*. And *Baker* in his Chronicle of *England ad annum 1541.* ſhews the ſame to be the practice of that Kingdom where the Crime is committed within the Verge of the Kings Court. In like manner by the Laws of many Places of *Italy*, a Wound given in the Face, leaving a Cicatrice, is puniſhable by loſs of the Hand *Cabal. diſt. caſ. 134. N. 1.* And *N. 31.* he relates a Deciſion, to this purpoſe of the *Magna Curia Vicaria*, againſt *Dominicus Feretta* who had wounded a young Boy in the Face; But I remember no Law or Deciſion ordaining ſimple wounding to be puniſhed with *amputation of the Hand*, out of theſe circumſtantiated Caſes: neither is there any thing like it to be found  
in

in the Law and Practice of this Kingdom; nor in any other case in our Law, except what I mentioned, *N. 9. supra*, where persons adjudged to Death for atrocious Crimes, were sentenced to have a Hand cut off, in aggravation of the Punishment, (as in several other Cases mentioned by *Carpz. dict. p. 3. q. 128. N. 55. 56. 57. et seqq.*) which was inflicted sometimes immediately before Death, or immediately thereafter, as the Crime deserv'd.

I find indeed several Acts of Parliament, (*viz. Act 18. Parl. 1. Act 88. 155 Parl. 6. Act 248. Parl. 15. Act 6. Parl. 16. Ja. 6.*) 'forbidding the using of certain offensive Weapons therein mentioned, under the pain of cutting off the Right hand; and the first of them proceeds upon a Narrative, that many of the Subjects had been murdered and slain; who, if they had not been assaulted with such Weapons, might have been able to have defended themselves; but the last of these Acts, contains a provision, "That if the Action be pursued before the Secret Council, the Delinquent shall not incur the Corporal Punishment, but shall be punished by Imprisonment, Escheat of Goods, or by Fyning, without prejudice of the Execution of the former Acts against such as shall be pursued before the Kings Justices, Which was inserted as a *Cautela* for preventing the inflicting of the corporal Punishment, because it leaves it in the option of the King and his Council to pursue before themselves; and accordingly all such Pursuits have been brought before them, & not before the Justices, that so a pecunial Mule't might be inflicted instead of corporal punishment; because the Council doth not inflict *Penam sanguinis*; that being proper to the Kings Justices: By which it's evident that *Amputation* of the hand has been inserted in these Acts, *ad terrorem* only. We have indeed an Ancient Statute *in cap. 2. Statut. Wilhelm.* which ordains him *who draws Blood in the Kings Court to have his Hand cut off*; But by the later Law, to wit, *Act. 173. Parl. 13. Ja. 6.* "He who strikes or hurts any person within the Inner Gate of the Kings Palace where His Majesty has his Residence for the time, Incurrs the Pain of Treason.

If any man shall here object and say, may we not according to *Snarez* his 156 Form of Reasoning, argue, that seing carrying of unlawful Weapons is punishable by our Law with the loss of the Right hand, though no *Mutilation* or *Demembration* follow on it; should not then *Demembration* be punished with the loss of the Hand, because its a greater Crime than single carrying of Arms? Answer, that *Snarez* his Argument as its fram'd, excludes the Consequence, because it is *argumentum a parte ad totum*, and not from lesser Crimes to greater, or by reason of any Similitude betwixt them. And this may serve for *Pena amputationis manus*.

I come now in the third place to speak of *Arbitrary Punishment*, which succeeded in the place of *Retaliation*, as appears by the following Words of *Fustinian S. 7. Inst. de Injur. Pena autem injuriarum ex lege XII Tabularum propter Membrum quidem ruptum talia erat: propter os vero fractum nummaria poene- 157 erant constituta, quasi in magna veterum paupertate. Sed postea Praetores permit- tobant ipsis, qui injuriam passis sunt, eam aestimare: ut iudex vel tanti [reum] condemnaret, quanti injuriam passus aestimaverit, vel minoris, prout ei visum fuerit. Sed Pena quidem injuriae quae ex lege XII Tabularum introducta est, in disuetudinem abiit: quam autem Praetores introduxerunt (qua etiam honoraria appellatur) in judiciis frequentatur inam secundum gradum dignitatis, utique honestatem, crescit aut minuitur aestimatio injuriae, qui gradus condemnationis. Et in servili persona non immerito servatur: ut aliud in servo, aliud in modici actus homine, aliud in vilissima vel compedito jure aestimationis constituitur. Which Text holds forth, that not only *pena talionis* propter membrum ruptum; but also the *pena nummaria* 25 assium for common Injuries; and*

those other Mulcts *pro offe fracto & dentibus excussis*, were gone in desuetude: and there remain'd no other Branch of the Law of Retaliation contain'd in the XII Tables, except what related to the Punishment of false Witnesses. The Text gives this Reason for abolishing the *pæna nummaria*, that they were enacted in *maxima veterum paupertate*; and though there be some Commentators who deny that the Romans were scarce of Money at the time; yet *Hotoman* proves it from *Plin. lib. 19. c. 3.* and *A. Gel. lib. 11. c. 1.* in which last we may read that the Romans pay'd all their Mulcts in Sheep and Oxen; and the Commentator in *usum Delphini* on that place N. 5. and on the *pæna 25 assium* in *A. Gel. lib. 20. c. 1. n. 7.* computes the 25 asses, *respondere Gallicis assibus circiter novem*; and therefore there was reason to abrogate those fixed Penalties which the insolent *L. Neracius* had contemn'd; as is mention'd before; and in their stead to introduce Arbitrary Punishments. But the Text doth not condescend on the cause why *Talio, propter membrum ruptum*, was abolished, and Arbitrary Punishment introduc'd in place of it, which had been Arbitrary before; for the very Ransom (whereof *S. Cæcilius* makes mention in his Defence of that Law, in the Analogical sense of it) was modified by the Prætor, *arbitrarie*; to make the Analogical proportion betwixt the Ransom and the Delict; but that which I take to have been the Reason why the *talio propter membrum ruptum* is said to have gone in desuetude, as well as the *pæna nummaria*; and Arbitrary punishment to have come equally in the room of both, is that the words in the Law *Talio Esto* were often detorted, by the Party injur'd, to a Pythagorickal sense when he was malicious, or when the Quantity of the Ransom did not please him. Wherefore it might be thought convenient in progress of time, to suffer that Law to go altogether in desuetude, and to give Redress to the Parties injur'd, by another Remedy; and probably it was by the *actio utilis* arising *ex leg. Aquilia*, which, having at first been introduc'd as an additional Remedy; and having for many years so continued without Derogation from these Laws of the Tables, might thereafter become the sole Remedy, and so continue till the *actio injuriarum* succeeded.

158 We see now by the words of *Tribonian*, that the *Lex Talionis* of the XII *Tabb.* was in desuetude, when the Institutions were published, which was *A. Ch. 533.* that being the precise Date of their Preface: and the words *Lex Talionis* are not to be found again in all the Text; but he doth not condescend at what time it went in desuetude and Arbitrary punishment succeeded; but *Tribonian* being the first that makes mention of its being in desuetude, its presum'd that the Change had been but a small time before, which being suppos'd, it follows that Analogical Retaliation had endured among the Romans 982 years or thereabout, these being the just years of the Interval betwixt the coming of the XII Tables to them *A. U. C. 302.* before Christ 449. and the foresaid year of Christ 533. in the which the Institutions were Published. And as the Conference betwixt *Phavorinus* and *S. Cæcilius* (*A. U. C. 894. A. Ch. 143*) wherein *S. Cæcilius* maintains Analogical Retaliation, proves the Existence of it, from the introducing of the Law till that year, *quia probatis extremis probatur medium*: Even so the Existence of it downwards, to a little before the Publishing of the Institutions, is to be presum'd, because no Alteration is prov'd, till *Tribonian* makes mention of it in this Text, saying, that it was gone in desuetude; and Arbitrary punishment had succeeded; meaning that some new Law, or Practice, had worn out these old Laws in whole, and had introduc'd Arbitrary Punishment for all the Degrees of the Crimes; whereas by the old Law, only the quota of the Ransom *propter membrum ruptum* was left to the Arbitriment of the Judge; the Pecuniary punishments foresaid being stated and determined.

It



It being thus made appear that *Arbitrary Punishment* came in place of *pœna talionis*; it follows that *Mutilation* and *Demembration*, are now punishable *pœna injuriarum arbitraria* as other Injuries committed by privat Violence; for which the Law had stated no particular Punishment. *Clar. §. final. 2. 83. N. 4. Damhaud. prax. Crim. C. 102. N. 9.* [where he gives many Instances of privat Violence, and describes them in general to be such as are committed *sine armis*] to which our Law and Practice agrees. *Mackenzie Inst. lib. 4. tit. 4.* where he particularly makes mention of *Mutilation*, among *Arbitrary Crimes*. And in his *Crim. tract. part. 2. tit. 31.* he acknowledges the Crime of *Demembration* to be punishable by inflicting a Mulct, in as far as in the form of a Doom or Sentence he inserts the *Quota*: and in all the Criminal Registers we have no other but *Arbitrary punishment*, for *Mutilation* and *Demembration*.

And in regard the Nature of this *Arbitrary Punishment* is not commonly understood, and the very Name of it is ready to give Offence to some who may apprehend that an *Arbitrary Judge* may do what he pleases; and that neither of our learned Countrey men, *Skeen* or *Mackenzie*, have insisted on it; I shall therefore crave Liberty to describe the Power of an *Arbitrary Judge*; and the nature of *Arbitrary punishment*; for the Benefit of those who do not well understand it.

*Arbitrary Punishment* answers to *Arbitrary Crimes*. All Crimes are divided in Ordinary, (called *Legitima*, because the Law hath determined the Nature both of Crime and Punishment) such as *Isamajesty*, *Homicide*, and other capital Crimes; and *Extraordinary*, or *Arbitrary*; in which the Law hath determined neither, but has left both, to the Arbitriment of the Judge; as in the case of *Förstallers* or *Dardanarii*, whom *Ulpian l. 6. ff. de extraord. Crim.* describes in these words, *Qui fructus suos æquis pretiis vendere nollent, dum minores uberes proventus exoptant.* This I name with respect to this present year of dearth and Scarcity, and because it is the greatest of that kind, *Solomon* having told us *Prov. 11. 26.* He that withholdeth Corn, the People shall curse him: but Blessings shall be upon the head of him that selleth it. A further Description of this may be seen in our Author, *p. i. tit. 23.* Other Crimes of this nature are set down *l. tit. ff. de extr. crim.* And by *Struvius* and others on that Title.

Anciently all Crimes and Punishments were determined by the Law; and therefore when a Criminal was condemned, the Sentence made mention of the Crime he was found guilty of, but not of the Punishment: The Law supposed the Punishment would be known, as soon as the Nature of the Crime was declar'd; *l. si præses 32. ff. de Pœnis. l. Accusatorum 1 §. 4. ff. ad S. C. Turpil:* But as Matters of Fact are more numerous than could be foreseen or comprehended in Laws. *l. 10. & 12. ff. de ll.* being almost infinit, as every one knows: Even so Punishments proper to these Matters of Fact, must be as numerous; and therefore the Lawgiver behov'd to give *Arbitrary Power* to the Judge for determining in those Emergencies, by the Rules of Equity, and to heighten or diminish the Punishment, as the Circumstances of the Fact require: And this is call'd *Arbitrary punishment*.

All these, to wit, the ancient and modern Custom, and the nature of this Punishment are briefly held forth by *Ulpian in l. 13. ff. de pœnis, Hodie* (says he, implying a former Custom and a Change) *licere ei, qui extra ordinem de Crimine cognoscit, quam vult sententiam ferre, vel graviolem vel leviolem, ita tamen ut in utroque moderationem non excedat.* And because the Judge, in so doing, supplies Defects in the Law, and yet does it by the Rules of Law and Equity: he is therefore called *Legis Auxilium.* *Eguin. Baro de divid. et individ. cap. 4. N. 4.*

- 164 From what we have said its evident, how justly Punishment in general (as it includes Ordinary, and Extraordinary or Arbitrary) is defin'd by an anonymous German in his Book, entituled *Jus Pandectarum Illustratum*, tit. de pœnis, to be; "a just Coercition or Restraining of certain Delicts or Crimes, according to their Measure and Merit, impos'd by Authority of Law, or its competent Judges, upon guilty persons condemned by a previous Sentence, to be inflicted, after the time allowed, by the Sentence, is elaps'd, and that for the utility of Government, and common Tranquillity of the People. Now ordinary punishment, is nothing but that Species which the Law, or Custom having force of Law imposeth, and hence is called Legal. Arbitrary is that which being imposed by no Law, Statute or Custom, is to be ordained by the Judge according to his Arbitriment; and is sometimes more, sometimes less according to Circumstances, Beckman medul. Justin. ff. de pœnis thes. 6. 7. 8. and this is what Justinian says, diſt. §. 7. inst. de injur. in these words, *secundum gradum dignitatis, vitæque honestatem, crescit aut minuitur æstimatione injuriæ*; And conform to this Skeen in his treatise of Crimes and Judges in Criminal Causes, tit. 1. cap. 2. says, "Crimes are punished by a lawful Pain specially set down and prescribed by the Law, or the pain thereof is Arbitrary. Lawful Pains are Capital or Pecunial, or neither Capital nor Pecunial, but of another kind and sort. Arbitrary Crimes are, which have no certain prescribed pain; but are punished by the Kings will & Mercy. Where observe, Skeen sets down the word Mercy for the words pleasure or Arbitriment, to hold forth that the King and his Judges should in Arbitrary Crimes incline rather to Mercy than Rigour, if the Cause will allow it.
- 165 For further clearing of the Nature of this Arbitrary Power; the Gloss. in l. fidei commissæ 11 §. quamquam 7. ad verb. Arbitrium, de legat. 3. and Menochius following it, lib. 1. de Arbitrar. qu. 6 n. 1. distinguish Arbitrium, in Plenum, & Regulatum; that is to say, absolute and limited. Plenum arbitrium (tull or absolute power) is that, whereby one acts according to his Appetite, and as he pleases. A Judge exercising such a Power, is called *Belua, & non Judex*; a furious Beast and not a Judge; Menoch. Proem. diſt. lib. N. 5. Regulatum, is that whereby one acts according to the dictats of Reason and Equity, and with due Moderation. And this is the Power, wherby a Judge cognosces Arbitrariè; and Ulpian both expresses the Power and its Limitation; in diſt. l. 13. to wit the Power, in these words *Qui extra ordinem de crimine cognoscit, quam vult sententiam ferre, graviores vel leviores*; and its Limitation, in these words, *ita tamen ut in utroque moderationem non excedat*.
- 166 Any man may use absolute Power in the Disposal of his Goods, & after what manner he pleases; that being the effect of Dominion which carries with it *jus utendi, vel abutendi*, except there be a restraint put on him for publick Good. Also, if a Legacy be left to be disposed of at the pleasure of the Heir, or with Condition, *Si volueris*, he may deliver or withhold it; but its not so when the Legacy is conferred in *Arbitrium Heredis*, or in words importing Arbitrium; this is evident by the words of Ulpian in diſt. §. 7. *Quamquam autem (inquit) fidei commissum non debetur, Si volueris: tamen si ita scriptum fuerit, si fueris arbitratus, si putaveris, si utile tibi fuerit visum, vel videbitur: debebitur: non enim plenum arbitrium voluntatis Heredi dedit, sed quasi bono viro commissum relictum*. This Law shews a clear difference betwixt the conferring a thing in voluntatem & arbitrium.
- 167 An Arbitrary Judge is the same with the prudent and wise Judge that Cicero, in orat. pro Ant. Cluentio speaks of, *Sapientis Judicis est meminisse se hominem: cogitare sibi tantum, a populo esse permissum; quantum com-*

commisſum, ſit & creditum, [ and its never to be thought that power is given to a Judge to do unjuſtly ] & non ſolum ſibi poteſtatem datam : verum etiam ſidem habitam meminiffe : poſſe, quem oderis abſolvere : quem non oderit condemnare, & ſemper non quod ipſe velit, ſed quid Lex & Religio cogat, cogitare : animam dvertere, qua legereus citetur, de quo reo cognoſcat, quæ res in quaſtione verſetur. cum hæc ſunt videnda, tum vero illud eſt hominis magni atque Sapientis cum illam, judicandam cauſam, tabellam ſumpſerit : non ſe putare eſſe ſolum : neque ſibi quocunque conſpicerit, licere : ſed habere in conſilio legem, Religionem, Equitatem, Fidem : Libidinem, Odium, Invidiam, Metum, Cupiditatesque omnes amovere, maximeque exiſtimare conſcientiam mentis ſuæ quam a Deo accēpimus : quæ à nobis diuelli non poteſt, quæ ſi optimorum conſiliorum & factorum teſtis in omni vita nobis erit : ſine ullo metu, & ſumma cum honeſtate vivemus. And the ſame with Ulpian's vir bonus, whom Alexander Neapolitanus ( or Al x. ab Alex. as he is commonly called ) Dier. g. vial. lib. 6. cap. 1. in ſin. defines. *Queſtioni autem ( inquit ) dires fuit quid virum bonum, quid civilem & po iticum deceat. Viro enim bono hoc datur ut ubique ſanctus, ubique caſtus, pius & integer ſit: cujus ne erratum quidem minimum fuerit, ne dicam vitium. Qui nullo malo derterritus, nullâ calamitate vitius fortuna cedat, nihil expetat, nihil dicat, nihil faciat in vita, niſi ſummâ cum laude & dignitate, in nullâ re delinquat, nullius rei contemnat, ſeruetque fœdera humani generis ita inuiolata in magnis minimisque rebus, ut ne minima quidam labe conſcientiæ detineatur. Civilem vero d. x. re hominem, qui legem judiciorumque metuens, quantum moribus legibusque tributum eſt, id tanto temperamento agit ut quoad fieri poſſit, nihil perperam, aut inconfulto admiſſurus ſit : qui ſua providentia, Religione, fide quantumque ratione provideri potuit, Reipublicæ & Civium ſaluti conſulat, legibus pareat, patriam tueatur, &c.* Here we have the Qualities of an Arbitrary Judge, and if he be endued with ſuch Qualities, his Arbitrary Power will not be terrifying; but the Author adds *Quem ſcil. virum bonum & civilem) nos magis ſingimus quam inuimus.* Yet every one ſhould endeavour to be ſuch, and to deſerve ſuch Characters.

By what's ſaid in theſe Characters, it appears in the general, that an Arbitrary Judge can do nothing that's unjuſt to gratify or pleaſe any perſon whatſoever of whatever Degree or Quality. Now let us more particularly conſider from Texts of Law. 1. What he cannot do. 2. What he can and ſhould do.

1. He cannot, without juſt Cauſe, augment or diminish a Punishment which the Law has already determined. *l. ſi quis reum 4. ff. de cuſtod. reor. Farin. qu. 17. de del. & pœnis. n. 5. 6. & ſeqq.* and a general ſtatute to Punish will not derogate from a ſpecial. *l. ſancio 14. ff. de pœnis.* Nor in general can he alter any thing determined by Law; except upon circumſtances where the Law allows an alteration; A caſe is look'd upon as determined, where either there is an expreſs Law, or conſequences drawn from Law by parity of Reason. *l. 11. 12. c. 12. ff. de legib.* or by cuſtome; for that hath the force of a Law, *l. 32. ff. de ll. to regulat Punishments. Farin. diſt. q. 17. n. 18.* and if he cannot alter a Punishment, but by permiſſion of Law, he can far leſs condemn the innocent, or abſolve the guilty. *l. d. curionum. 12. §. 1. in ſin. cod. de pœnis,* for both are abomination to the Lord, *Prov. 17. 15.*

2. He cannot totally remit a Punishment to gratify the People. *l. ad beſtias 13. ff. de pœn.* eſpecially after ſentence is pronounced. *l. penam 15. c. cod.* & in many caſes it's not ſafe, for them to remit, who have power to do it: becauſe it's the Intereſt of the Publick that Crimes be Punished; that ſo wicked men may be Reclaimed. *l. ſi pœna 20. ff. de pœnis & ibi Gothofrid. lit. E. l. ſi operis 14. C. cod.* and tranquillity be preſerved. *W. ſenb. n. 9. ff. d. tit. oderunt peccare boni*



*boni virtutis honore, mali vero formidine pena.* It's a saying of St. Bernard. lib. 2. *de considerat: Impunitas incuria soboles, insolentia mater, Radix impudentia, transgressionum nutritrix.* And questionless Cicero was in the right disputing against Calenus: His words (Philippic 8.) are *Ego nolo quemquam civem committere, ut morte muliandus sit: tu, etiamsi commiserit, conservandum putas. In corpore si quid reliquo corpori noceat, uri ac secari patimur: ut membrorum aliquod potius quam totum corpus intreat. Sic in Reipubl corpore, ut totum saluum sit, quicquid est pestiferum amputetur: dura vox, multa illa duri r, salvi sint improbi, scelerati, impii: deleantur innocentes honesti, boni, tota Respublica.* "I would have no Citizen (says Cicero) desire to dy, but thou (Calenus) wouldst have none to dy though he deserv'd it. It is but Reason that as in the body natural we cut off an arm to save the whole, so in the Body politick we do the same that nothing remaine alive that will make the other dy. It's a hard sentence, it's true, but this is an harder; let the wicked be safe, and let the innocent, the good, the just men, the whole Common-wealth be destroyed. This is only applyed when punishment is absolutely necessary.

171 3. He cannot extend Punishment beyond merit, It would be a hard thing to americiat a man in a vast Sum of Money for a peccadillo or small trifle; or even for a delinquency, which does not really deserve such a Punishment. And by the same Rule it would infer partiality to punish a great fault in a rich Man, by the only exacting of a Crown; But equality must be observed betwixt the Fault and the Punishment. *l. 16. ff. de penis, farin. de delict & penis, qu. 17. n. 9.* yea, he cannot Punish any man more severely than the Law will allow; though he should receive a command from the Prince. He must in this case, delay sentence till he acquaint his Prince, and in the mean time cause the delinquent to be sufficiently guarded and secured. *l. si vindicand. 20. cod. de penis.*

172 4. He cannot Punish one man for the fault of another, even albeit the innocent be nearly related to the guilty Person by blood, affinity or friendship. *l. si 20. l. Crimen 26. ff. de penis. l. sancimus 22. cod. eod.* yea though the innocent person should offer his life for the guilty. *Quia nemo est Dominus membrorum suorum. l. liber homo. 23. ff. ad leg. Aquil.* This agrees with the Law of Moses, *Deut. 24. 26.* and to natural Reason; for punishment being an Act of Revenge, it must be inflicted upon the delinquent himself, seing no man can be *alieni criminis successor; ut in d. l. 26.* For as Seneca says lib. 2. *de ira cap. 24. nihil iniquius quam aliquem, heredem paterni odii ferri.* But yet we must here except the Crime of Treason concerning which see our Author *Crim. part 1. Tit. n. 22. supra.* we must also except the Laws which impose pecuniary mulcts to be payed by Parents for their Children, and Masters for their Servants. *Act 69. Parl. 6. Ja. 4.* with other Acts and Laws of the same nature, *vid. Farin. qu. 24. N. 134. & 189. Clar. §. fin. qu. 86. n. 5.* where he says it's the common opinion; but there must be a statute for it, and the delict must be prov'd, and the Punishment cannot exceed the Childs *legitime. n. 7. 8. & 9. ibid.* See *Matheus lib. ff. 48. tit. 18. cap. 4. N. 2.*

173 5. He should not delay the Execution of a Sentence beyond the ordinary time. *Carpz. pract. crim. p. 3. q. 137. N. 2. & seqq.* except in weighty Causes mentioned by him. *N. 11. & seqq.* lest he thereby give occasion to contrivances for the Delinquents liberation *l. cum reus 18. cod. de penis.*

174 It's questioned among the DD. whether Arbitrary Punishment can reach *ad penam sanguinis*, and some are for the affirmative, others for the negative. see *Maranta disp. 3. Gomez. de injur. C. 6. N. 8.* and many others cited by *Farin. tit. de delict. & penis qu. 17. N. 34. & seqq.* where he sets down many cases in which it may be or not be: but all agree in this that death can never

ver be inflicted, unless the atrocitie of the Crime deserve it; *farin. d. qu. 17. N. 35.* And so *Fachin. contravers. lib. 9. C. 45.* understands *l. saccularii 7. l. sunt quedam 9 ff. de extraord. Crim. l. 1. & 2. C. de his qui latron acculi. l. julia 17 §. hodie 3. ff. ad leg. jul. Repetun.* and thereby thinks he reconciles the contrary opinions: because *Arbitrium* is restricted in *l. 1. ff. de fur. talne. l. 1. expilatores. ff. de effra.* on this Reason, that the Quality of the Crime required it should be Restricted: But we need not much insist to debate the Question, because our Author *Crim. tract. P. 2. tit. N. 4.* Expressly concludes by Arguments drawn from Acts of Parliament, that no mans life can be ever taken, without express Law; there he also cites *Chaseaus, Socinus* and a Decision of *Pappon.* I remit to the place where you may read his Arguments.

If it be here asked whether Arbitrary Punishment can be extended to the Amputation of an Hand or any other Member? I answer, that several of the DD. cited by *Mattheus Crim. ad lib. 48. N. 12.* think it may; however I have not observed any such thing in our practice.

These are things which an Arbitrary Judge may not do the things he may do fall under two heads; First, he may determine a Punishment for extraordinary Crimes; Secondly, he may lighten or lessen the Punishment of Ordinary Crimes, where the Circumstances of Fact approv'd by Law require it; *faciemus questio in Arbitrio judicantis est: pena vero persequentio non ejus voluntati mandatur, sed legis auctoritati reservatur,* says *Papinian* in *l. accusatorem 1. §. fin. ff. ad SC. Turpil. l. Ordine 15. ff. ad munic.* And there is a most pertinent Text, in *l. & si severior 3. & ibi gloss. & Salycet C. ex quib. cau. infam. irrog* where *Salycet* answers the contrary Objections. See many other Texts and Authors to this purpose cited by *Farin. d. q. 17. N. 7.* who gives the Reason *N. 8.* (which we mentioned before, ) to wit, that being Crimes are committed with different Circumstances and Qualities, whereby they are sometimes to be excus'd, and at other times to be esteem'd more odious and atrocious; *C. Sicut dignum. 6. in pr. de Homicid. l. si adulterium 38. §. imperator 8. ff. de adult. l. Gracchus 4. C. ad l. jul. de eod.* and that all these Circumstances and Qualities could not be express'd in the Law, though some be, *l. aut facta 16. §. 1. cum 2. seqq. ff. de penis;* therefore this power and faculty of Augmenting or diminishing Punishments according to Contingencies of Fact, behov'd to be left to the Arbitriment of the Judge *d. l. aut facta d. quid ergo 13. §. pena gravior 7. ff. de his qui not. infam.* where his power of augmenting of Pecuniary Mulcts, and chainging those Mulcts into Relegation, is expressed.

There is the like necessity for Arbitrary Power in some civil Cases; as in that stated by *Veneleius, l. continuus 137. §. cum ita 2. de verb. oblig. viz.* a person at *Rome* promises to pay a Sum of Money at *Ephesus*, in *Asia*, and makes no mention of the day of payment: now the Rule in such indefinite Obligations is *in quibus dies non ponitur, presenti die debetur. l. in omnibus 14. de Reg. Jur.* but *Veneleius* resolves better, that the time of payment be rather remitted to the Arbitriment of the Judge "who is to allow such a competent time as a diligent man might travel in to *Ephesus*, neither obliging him to travel Night and Day without regard to tempestuous Weather, neither yet allowing him to Loyer in such a manner as he might be thought worthy of Reproof, but so orders the matter with respect to his Age, Sex, Health, as he may have time to go to the place appointed; that is to say, such a time as others in his Condition are wont to perform the Journey in, and with this Provision, that if he by double diligence or by the happy occasion of a Ship shall arrive at *Ephesus* sooner than others by an ordinary Journey use to do, he shall instantly be obliged to pay quia in ea quod tempore atque facto finitum est, nullus est conjectura locus. These

are the words of the Text, and none can be more clear to prove the necessity of such a regulated Arbitrary power we have described.

- 178 And yet for all this, it cannot be said the Judge is more favourable than the Law, or that he contravenes the Law, or departs from it; but rather that he is *Legis auxilium* as we said before, and a Preserver of the Law, because so the Law wills and disposes, not only by many particular Texts, but also by that general Rule, *Quod poena est commensuranda delicto, de qua in l. sancimus 22. C. de penis.* And *Farin.* from all this lays it down for a general Rule, *N. 10. d. qu.* that the Law has given the Judge a power, to augment, diminish, or change Punishments, according to the Qualities or Circumstances of the Delinquency. All this is fully proved, and the contrary Arguments solved by *Cariz. d. pract. crim. p. 3. qu. 142. N. 22.* who is so far from denying this Power to Judges, that he thinks all Punishments of whatsoever Crimes, to be now in the Arbitriment of the Judge according to Circumstances; and proves it. *N. seqq.* And this is agreeable to the words of *Aristotle lib. 5. ethic. C. 5. Iudex debet esse clementior lege scripta, quando ejusdem legis & justitie ratio ita fert & patitur.* And holds, even albeit the Judge who is obliged to swear to the Observation of the Laws. *l. rem non novam 14. C. de judiciis.* has actually sworn to observe them, *Rom. in rubr. ff. de Arbitr. col. 5. per. Item quia quamvis juraverit & Consil. 429. cited by Farin. d. q. N. 17.* And the Reasons are, that the Law it self gives this Arbitrary Power to a Judge, to exercise it as the Circumstances require; And in every Oath the Authority of Law and Equity is presumed to be excepted: *Arg. l. fin. ff. qui satisd. cog.* and an Oath takes not away common Law and Equity, *l. si ex falsis 42. C. de transact. & l. fin. C. de non num. pec.* And a Judge never incurs Perjury for receding from the words of the Laws upon just grounds, because he has power to recede in that case. *Arg. l. si hominem 30. ff. mandat. Farin. d. qu. 17. N. 17.*

- 179 But as the Law has given this power to a Judge to augment and diminish punishment in ordinarie, and to determine punishment in extraordinary Crimes, yet 1. Its not every Judge or Magistrat that has this power, but those of the highest degree; And inferior Magistrats must consult the Prince, specially after a Sentence is pronounced; *DD. in d. §. poena gravior. Vivius in lib. Commun. opin. in verb. Iudex ubicumq. Covarruv. Variar. Resolut. lib. 2. cap. 9. N. 8. Tyraquel. tract. de penis, in prefat. N. 22. Jul. Clarus in pract. crim. §. fin. quest. 58. versic. alterius quero. N. 10. 2.* The Judge or Magistrat must in his Sentence express the Causes why he recedes from the ordinary punishment of Law; but some think it's sufficient that the Sentence bear in general, that he did it for Causes moving him thereto. *Clarus loc. cit. Vasquez. Contrav. illust. C. 14. N. 5.* and this is according to the present practise of the Imperial Chamber, *Gail. de pac. pub. C. 9. N. 23. 3.* Then, he cannot proceed in contempt of the Law, but in all his proceedings, must have regard thereto. *Gail. & Vasq. locis cit. Mynsing. cent. 2. observ. 50. & 54.* and to the circumstances of the case; but if in *dubio* he mistake the case and alter the Punishment without just cause, the Law presumes for him that he acted *ex justa causa*; this is also according to the practise of the Imperial Chamber, *Gail. d. Obs. N. 26.* where he cites *Felin. Rom. & Bart.* asserting it to be the practise else where.

- 180 The *DD.* condescend on many Circumstances for imposing or altering of punishments; but let us first consider those Seven; *Causa, Persona, Locus, Tempus, Qualitas, Quantitas, Eventus,* mentioned by *Claudius Saturninus in d. l. aut facta. 16. ff. de penis.*

- 181 1. As to the Cause. The *DD.* have written largely on it: but to be brief, the Judge is to consider with *Marcianus in l. perspicendum. 11. §. delinquen-*



tur 2: ff: de pœn. If the Delinquent acted *ex proposito, vel impetu, vel casu*, he gives this Example of the first, when one comes with a Company to perpetrate the Fact; of the second, when he falls a fighting in Drunkenness; of the third, when at Hunting he kills a Man by a Dart thrown at a wild Beast; to these add a fourth, to wit, *culpa*, or Negligence. I only name them; for all of them are described by our Author tit: Murder; and certainly they make a great Alteration as to Punishment, even in the cases of Killing, *Mutilation* and *Demembration*, Farin: de Homicid: qu: 119: N: 7. 2. The Judge should consider if the Crime be *consummated* or *attempted* only; the last is not to be so severely punish'd as the first, as is clear by the case of an Arbitrary Crime stated l: 1: in prin: §: ult: de extraord. Crim. l: qui autem 3: ff: de his qui noi: infam: l: vulgaris 21: §: qui furti ff: de furtis. Except in Treason l: quisquis 5: c: ad leg: Jul: Majest. Paricide l: 1: in fin; ad leg: Pomp: de Paricid. et Arg: l: 6. eod. Attempting to kill an Infant l: si quis: 8: C: ad leg: Corn: de scar: for in this there is more Cruelty, than in attempting to kill a man. Farin: de Homicid: qu: 119: N: 22. And a Wifes attempting or declaring her Intention to kill her Husband; et d' contras: si forte mulier: 9: C: ad leg: Cornel: de scar. and this may be the Reason, that they live in a conjunct Society, and under mutual Trust. There be some other atrocious Crimes wherein *conatus* is to be punished, as if the Crime were consummated, vid: Farin: de Homicid: qu: 124. N: 1: & seqq. But in cases not so atrocious, *Conatus* is never equal'd to *Consummation*. 3. The Judge should consider if the Delinquent acted *of his own accord*, or *by command of another*; in the first case he is to be punish'd, and all the Laws above cited prove it. In the second case if the Crime was committed by a Servant at the Command of his Lord; or by a Pupil at the Command of his Tutor or Curator, and be not Atrocious the Punishment may be remitted, l. ad ea. 157. in prin. ff: de diver: Reg: jur. the like when one acts by command of a Judge, l: non videntur. 167. eod. The like in a Soldier obeying his Officer whom he was oblig'd to obey; as in the case 2. Dec. 1641: part 1: N: 86: supra, Jaredin against Edmonston; in which *Mutilation* committed on a Deserter by one who was oblig'd to apprehend him was excus'd. The like generally holds in all cases, where one is oblig'd to obey, l: is damnum: 169: ff: de Reg: jur. And though the Crime be Atrocious, the Command of a Superior where there was no Obligation to obey, mitigates the Punishment. l: Servus: 20: ff: de oblig: et act: l: Servus 8: Cap: ad leg: Jul: de vi publ: l: si Servus: 2: C: de sepulch: viol: l: qui cum uno. 4. §. qui solum. 11. ff: de re milit. but does not liberat, and this agrees with Carp: pract: Crim: p: 1: qu: 4: N: 7: 8. where he cites not only Texts of Law, but a Decision of the Supreme Court of Saxony: and with our Practique, for March 1671. it was found after a most contentious Debate, that two Boys, the youngest whereof was not twelve years of Age, should pass to the Knowledge of an Inquest for assisting in the Company of 15 Armed men sent by their Father to demolish an House in the time of a Storm, whereof the Pursuer was in Possession. These things I have the more insisted on, because they frequently occur as Excuses and Extenuations in Processes of *Mutilation* and *Demembration*.

2. The person (whether considered as Agent or Patient) makes a great Alteration in Punishment, d: l: aut facta 16 §. Persona. 3: ff: de pœn. Each may be considered under four Heads, Sex, Age, State, Quality. 1. As to the Sex; the Law deals more mildly with Women than with Men, on the account of their Infirmary both of Body and Mind, l: si adulterium 38: §: 7: & 8: ff: ad leg: Jul: de adult: l: quisquis 5: §: ad filias 3: C: ad leg: Jul: Majest. l: Sacrilegii 6: ff: ad leg: Jul: peculat. And when they are the persons injur'd, the Law punishes the Delinquent with the greater severity, because they are the less able to defend themselves; And therefore albeit Deformity in a man

occasion'd

occasion'd by Wounding or Mutilation doth not augment the Punishment. *Farin. de Homicid: insp: 4: q: 119: N: 118.* yet the contrary is true when a Virgin is thereby deform'd, because in that case she needs greater Tocher or Portion. *Farin: loc: cit: de delict: Cap: 6: Rubric: de injur: N: 12. vers. addi tamen. Farin: d: quæst. N: 119. 2.* As to the Age; Albeit Minority does not procure Impunity, if the Delinquent be such as for Age may be *deli Capax*, *l. impunitas 7: C: de pœnis. Mackenzie p. 1: tit: 1: N: 5.* yet Minority extenuates *Mackenzie loc: cit:* because of the imbecillity of Judgment, *l. si ex causa 9: §: nunc videndum. 2: l. auxilium 37: §: 1: ff: de minorib. vid: Carpz: pract: crim: p. 3: q: 143.* upon the Question how far Minority excuses or mitigates the Crime. And generally in omnibus pœnâlibus judiciis & ætati & imprudentia succurritur. *l. 108: ff: de Reg: jur: Tyraquel: de pœn: temper: Cas: 7: Menoch: de Arbitr: Cas. 329.* and therefore if a Minor should mutilat or wound his Neighbour, his Non-age would mitigate but not excuse the Mutilation, seeing it doth not excuse him in Homicide; but if one mutilats, wounds, or demembers a Minor, the Punishment may be augmented according as he is capable or less capable to defend himself. In like manner, regard is to be had to old and decrepit Persons when they commit the Injury, *l. 31: ff: de termin: mot. or receive it, l. si quis in gravi 3: §: ignoscatur. 7: ff: de S. C. Silin. Tyraquel: d. tract. de pœn. Cas. 8: Menoch. c. f. cit.* The Reason is they become weak in Judgment, like Children. *Carpz. pract. crim: p. 3. quæst. 144. 3.* The state and condition of the person makes an Alteration in Punishments; especially if they be corporal and ignominious. Slaves were more severely punished, than free Men, for the same Crime, *l. 1: 16: & l. 16: §: persona ff: de pœnis: l. capitalium. 28: §: non omnes. 2. eod.* and Infamous more than Famous. *d. l. 28: §: ult.* 4. As to the Quality; It's certain that if any man demember, mutilat or any ways Invade a Magistrat, Parent, or Person of Honour, he commits a greater Injury, and is more severely to be punish'd than if he had Invaded his Equal or an abject person, *d. l. 16: §: 3: ff: de pœn: l. ult: ff: eod: d. §: §: 7: & 9: inst. de injur.* But if a Magistrat or Person of Honour should commit these or the like Crimes against a person of lower Degree, he should not incur the same corporal Punishment. This we see in the Instance of the *Decuriones* who could not be condemned to the Mines, nor to be hang'd or burnt alive, *l. moris. 9: §: istæ fere sunt pœnæ. 11. ff: de pœn.* And the Emperour *Hadrian* would not allow them to be punished capitally unless for *Parricide*. *l. Divus 15: ff: eod.* and their Children had the same privilege *d. §: 11.* Neither could any person of Repute be punish'd with Fustigation, *d. l. 28. §. 2.* nor be sent to the Mines, *§. 5.* neither were Nobles to be punish'd by hanging, *Tyraquel: de nobilib: Cap. 20. N: 104. & 106. Covarr. Resol. lib. 20. cap: 9: de pœnis crim: eorumque modo. N. 34. & seqq.* nor to undergo ignominious Punishments, *Fulgos. Consil. 167.* But to compensate this, the pecuniary Punishment of a Nobleman went much higher, because of his Riches, *Covarr. diç. loc.*

183 3. The Place where the Crime is committed, makes the same Act to be Theft or Sacrilege, and to be punished with Death, or a less punishment, *d. l. 26. §. 4. ff: de pœn.* He that Mutilats or Wounds another in the Church, Theatre, Mercat-place, or in the presence of a Magistrat, is more Criminal than if he had done it in a privat place, *d. §. 9. inst. de injur.* And for the same cause, "its Treason to Strike, Hurt or Slay any person in the Parliament-house during the holding of the Parliament, or within the King's Inner-Chamber, or Chamber of Presence, the King for the time being within his Palace; or where the Lords of Session sit for Administration of Justice, at the time they are sitting, or within the Kings Privy Council House, the time of the Council sitting there; or in presence of his Majesty, where ever His Highness shall happen to be for the time. *Act 175. Parl. 13. Ja. 6.* Which Act also in other particulars makes the circumstances of Place,

to augment or diminish punishment. See also what we said concerning Amputation of the Hand, with respect to the Circumstance of Place. N. 154. *supra*.

4. Time makes a difference betwixt a Diurnal and a nocturnal Theft. *d. 184*  
16. §. 4. ff. de pen. The first is punishable *paua ordinaria*, the last *paua extraordinaria*, l. 1. & 2. ff. de furib. balnear. and betwixt breakers of Prison in the night and in the day-time. l. 2. ff. de effractor. In like manner, a Delinquent who reiterates a Crime, is more severely punished than if he had been but once guilty. l. 3. C. de Episc. audient. l. Capitalium 28. §. solent quidam.  
3. 8. Grassatores 10. & §. famosis. 15. ff. de penis. In this last Paragraph. Famous, or common Robbers are ordained to be hanged in the places where they most frequently transgressed, that others by beholding their punishments, might be deterred from committing the like Crimes, and the Friends and near Relations of these whom they had murdered or robbed, might be thereby comforted; In the above-cited case, 15. July 1642. Chynes against Mowat and Nevings, their Fynes, or pecuniary Mulcts were made greater than ordinary, because the Pannels had been guilty of the like Crimes before, as the Decision bears. Under this circumstance of Time, the DD. bring in long Imprisonment, taking off the Punishment of Banishment, in regard that Squalor Carceris, which deprives a Man of the use of Light and free Air, is of it self a punishment, l. omnes. 23. C. de penis. and likewise Banishment taking off the Infamy which accompanies a Crime deserving a pecuniary Mulct, in regard that Relegation is more severe than the other, l. quid ergo, 13. §. pena gravior, ff. de his. qui not. infam. But Carpz. makes *diutina in carceribus detentio*, to be a Circumstance by it self, p. 3. qu. 149.

5. Quality of the Fact, of the person we have (spoken already) distinguishes atrocious from lesser Crimes. *d. §. atrox. 9. inst. de injur. manifest*  
Theft from not manifest; Expilators from Thieves; Tumults from contrived and designed Invasions; Petulancies from Violence, *d. l. 16. §. 5. ff. de pen.* common Theft from peculat, which is a stealing or concealing of publick Money. l. 4. & 10. ff. ad leg. jul. peculat. & sacr. and from Sacrilodge. l. 6. cod. which is a stealing of things dedicated to pious uses, and punishable with Death, l. 9. cod. And Demembration of an Eye from Demembration of a Finger, because the Eye is a more necessary Member than the other, and the Injury done to it should augment the punishment.

6. Quantity distinguishes *Furtum ab Abigeo. d. l. 16. §. 7.* It being a greater Crime to take away a whole Herd of Swine, which is *Abigeum*; than to take away one of them, which is *Furtum*; And it's a greater Crime to give many Wounds, than to give but one; and to Demember, than to Mutilate; and therefore the Punishment should be the greater.

7. Event encreases Crime and Punishment, *d. l. 16. §. 8.* It was a greater Crime to burn the Corns in Africa, which serv'd the Miners, than in some other Countries, because the want of Food obstructed the Work, and the great Profit that arose from it. And it's a less Crime to strike off the Hand of a single man wanting a Trade, and Family, than of an excellent Artificer, who by his Handy-work maintains and enriches himself, his Wife and Children; and the Delinquent ought to be the more severely punish'd, and to pay greater Damages in the last case, than in the other.

Damages are due by the Rules of natural Equity and Reason; and *Fa- 188*  
*rin: in sp. 4. q. 114. N. 93: cites Murfil. to prove it, and also consulting with Criminal Judges who content themselves to condemn the Manslayer to die for the Crime; but decern no Damages to be pay'd to the persons injur'd. Further Farin. says, that where ever a Criminal Action arises ex Delicto there also arises Actio in factum ad interesse. h. qui nomine 25. & l. Hadie 92. §. 1. ff. ad leg. Cornel. de fals. and that the Fisk should not carry away all the Goods*



of the condemned Person, by vertue of the Confiscation, to the prejudice of the dammified Persons and their Heirs; and cites *Decif: Lucen: 62: N: 30.*

- 189 But then the main Question will be, how far the payment of Damnges should extend? To clear this the D D. distinguish them in *Intrinsic* and *Extrinsic*. *Intrinsic*, respect the Reward of Physicians and the Expense of the Cure: *Extrinsic*, respect the value of the lost Work, which the killed mutilated or demembered Person might have gain'd, if the Crime had not been committed. Both these Damnges ought to be pay'd, *l: qua actione 7: in prin:* in those words *quod minus ex operis*, *ff: ad leg: Aquil:* which Law speaks expressly *de vulnerante*. There is another excellent Text *in l: ex hac lege 3: ff: si quidrup: pauper:* in these words, *et operarum amissarum quasque amissurus quis esset:* and another Text *in l: fin: ff: de his qui effud: vel dejec:* in these words, *præterea operarum quibus caruit vel cariturus est.* Many other Texts are cited by *Farin: d: insp: q: 114: N: 95: & 96.* where he expressly states the case of Tradesmen, and concludes, that if a Nobleman who liv'd upon his Revenues, and not accustomed to work, be kill'd, nothing is due upon the account of Workmanship, or other extrinsic Damnges, and that the same holds, when a man is killed or wounded that had no Trade. And further *N. N. 115, 116, 117.* he persists to prove the Obligation of Damnges for lost Work and cessant Gain, even in the cases of *Debilitation, Mutilation, and prescinding of Members.*
- 190 This Obligation to pay Damnges is founded upon a Divine Law, *Exod. 20. 18, 19.* *If men strive together, and one smite another with a stone or with his fist, and he die not but keepeth his bed: if he rise again, then shall he that smote him be quit: only he shall pay for the loss of his time; and shall cause him to be thoroughly healed.* Here is a Warrant both for *Extrinsic* and *Intrinsic* Damnges; and we shew before how far the Jews decerned Damnges by vertue of this Text.

- 191 The Modification of Damnges is to be made at the Arbitriment of the Judge, *Memoch: de Arbitr: lib: 2: cas: 122: N: 3.* (and in *N. 1.* he cites the foresaid Text in *Exodus* as its Foundation): In modifying, the Quality of the persons is to be considered, and an Oath *in litem* may be taken after Taxing, *Farin: d: insp: 4: N: 113:* if the Crime was committed *ex dolo*, and not otherwise. *N: 114: ibid.* Also the Judge may make use of skillful men to enquire into these Damnges, *ibid:* where he cites *Salycet* and others; and the number of the injur'd persons Family is to be considered, not only as it consisted of Parents, Wife, Children and Servants, whom he was obliged to maintain: But also of Strangers who had their Entertainment by him, and could not otherwise maintain themselves, *Farin: d: insp: 4. q: 119. N: 105: 106.* Further, he thinks the Delinquent ought to pay all Damnges which these in Society with him sustained by the Breach of that Society, *N: 106: ibid:* where he cites several Texts, and D D. anent the matter of Arbitrary Punishment and Damnges. If any one desires to be further satisfied, he may consult the Authors above cited, and particularly *Farin:* and *Tyraquel: locis cit.* *Ant. Mathæus ad lib: 48: ff: tit: 18: cap: 4.* And *Carpz: d. p: 3. q: 149.* where he adds other five Circumstances for mitigating Punishment. 1. A promise of Mitigation, to draw forth a Confession. 2. A spontaneous Confession. 3. Long Imprisonment. 4. The Intercession of a young Maid to obtain the Delinquent in Marriage. 5. The skillfulness of the Delinquent in some useful and eminent Art.

- 192 Having drawn out this Discourse to a greater length than I intended, I shall conclude with a few Considerations taken from the Law and Practique of this Kingdom. We shew before that *Mutilation and Demembration* are by the daily Practice punish'd Arbitrariè by the Lords Commissioners of the Justiciary; who are in use to decern a Sum of Money to be payed by the Pannel or Delinquent

Delinquent to the Party injur'd, for all he can ask or crave, either for Dam-nages or Punishment, except the Delinquency be very atrocious, and then they also Imprison or banish the Delinquent: likewise, they modify a Fine to be pay'd to the King, ( especially if the Crime be *Demembration* ) and the Delin-quent finds Caution to satisfy the Damages and Fynes decern'd, or to go to Prison till he pay: He is also Burthened to procure a Remission, and for that effect the Pursuer is decern'd to give him a Letter of Slains. These things be- ing dayly practis'd need no Confirmation, but if any one desires to see Proofs he may read the following Decisions, 8: *March* 1685. where *Lermont* is fin'd in 300 Merks to be pay'd to *Fowls*, for demembrating him of the Ring-Finger of his left Hand, and his Goods Escheated to the King. 19. *Feb.* 1608. where *Duncan* found guilty of mutilating *Davidson* Meal-maker, of two Fingers of his left Hand, is decerned to pay the Expense of the Cure, and remitted to Prison till he satisfie, and to obtain a Letter of Slays. 11. *March* 1631. *Scot* found guilty of breaking *Crawfords* Leg, is decerned to pay 250 Merks to him, he granting a Letter of Slays. And 15. *Decemb.* 1630. *Kennedy*, in *Maybole* is decerned to pay 100 Merks to *Barclay* for the Cure of his Arm which he had mutilat. And 15. *July* 1672. *Momat* and *Neivings* pursued by *Cheyne* of *Val-ley* and his Brother, for *Mutilation* and *Demembration*, were decerned to pay a thousand Pounds to the Pursuers, and a Fyne to the King; and to procure a Remission, as the Privy Council had recommended; as may be seen in the Crimi-nal Registers, 29. *July* 1642. and 25. *August* following. But Damages are ne-ver decerned, unless the Party injur'd pursue for them; and all this is founded on an old Statute, *Cap:* 11: *Stat:* 2: *Rob:* 2. which likewise prescribes a corporal Punishment, and the method of Pursuing; the words are " If any man mutilate another, or Wounds or Beats him by forethought " Felony, and the Party griev'd pursues him before a Judge by Suit or Com-plaint, such Form and Order of Process shall be deduced and led against " the Trespasser, as is ordained against a Man-slayer, until he compeere at a pe-emptory day, and then he shall pass to the knowledge of an Assize; and " if he be convict by the Assize, he shall Redeem his Life from the Judge, or " Major, and by the Consideration of the Judge he shall satisfie the Party les'd; " And if he be not pursu'd by the Party les'd, he shall be Indicted for that " Deed, and thole an Assize, at the Justice Air, without delay or excuse, & be- ing convict, shall Redeem his Life and Assyth the Party. The Foundation of the Action for Damages lies in these words, which appoint the Party les'd to be satisfy'd by the Consideration of the Judge, when the Party les'd is Pursuer, and to be Assythed if the Delinquent be Indicted.

But the great Difficulty lyes in these words of the Statute, which ordains the Delinquent *who mutilats or wounds another by forethought Felony, to be pursued* <sup>193</sup> *by the same manner of Proces as a Man-slayer is pursued, and if he be convict to redeem his Life:* which leads me to the last Punishment of *Mutilation* and *Demembration* I promised to speak to, *viz.* If it be Capital? For the Words HE SHALL REDEEM HIS LIFE, imply, that the Judge if he find cause, may inflict Capital Punishment, if the Crime be committed by *forethought Felony*, which is the case of the Statute. The Grounds of this Difficulty, be- side the words of the Statute, are 1. That *Skeen*, who in the Latine Copy of the old Statutes has written learn'd Notes on them, passes this Statute without any Observation, which holds furth that it appeared difficult to him, or other- wise, that it plainly decreed that capital Punishment might be inflicted in the case of the Statute. 2. There are divers later Laws, *viz.* *AÆ* 28. *Parl.* 3. *Ja.* 4. *AÆ* 118. *Parl.* 7. *Ja.* 5. *AÆ* 76. *Parl.* 6. and *AÆ* 3. *Parl.* 21. *Ja.* 6. which rank the Crimes of *Mutilation* and *Demembration* with *Homicide* and other

## 66 Of Mutilation and Demembration, &c.

*Capital Crimes*, and ordain them to be pursued by the same form and manner of Process; which are the very words of King Robert's Statute. And none of these Statutes are rescinded by any posterior Law. 3. If Trespassers were not liable to the pain of Death, but only to pecuniary Mulcts, they would not need Remissions, and yet by the above-cited Decisions it appears, that the Judges after they had decreed Damages to the Party injured, and Fines to the King, they decreed them to procure Remissions, and the Plaintiffe to consent thereto, by granting a Letter of Slaines. Moreover, upon the 17. of May 1610. Keith, pursued by Lindsay for Demembration, produced a Remission which he had obtained before the Pursuit, burdening him to assyth the Party, which shews that an Assythment is not sufficient to free the Party of further punishment. Lastly, There's a Letter from the King to the Privy Council recorded in the Journal Books, 14. Sept. 1608. recommending that Henderson for demembrating Montgomery of three Fingers of his left Hand might be banished, because it was not usual in this Nation to inflict the pain of Death for the Crime of Demembration. These words do imply that there was a Law for that Punishment, but it was gone in Desuetude: And these grounds of Doubt are considerable. But to me it seems that the Statute of King Robert was made only *ad terrorem* and to force a Ransome from the Delinquent, because it runs not in the Stile of a *peremptory and positive Statute*, but in words importing that the Life was in the Kings Will, and was to be redeemed by a Ransome at the Discretion of the Judge, and so it comes to the Sense which S. Cecilus in his Conference with Phavorinus puts on the Law of Retaliation in the XII Tables; And it would have been very hard, after all Nations have rejected *strict Retaliation* to have punished Demembration with Death, unless the Crime were accompanied with such atrocious Circumstances, as might justly augment the punishment. We read in Strabo lib. 15. that some Indians did both inflict Retaliation and Death; but Grotius *de jure B. & P. lib. 2. cap. 20.* proves by many Testimonies that Christians, though they may justly demand Punishment, yet should incline to the meekest part. And the Law gives it for a Rule in *penalibus l. factum. 155. §. 2. ff. de Reg. jur.* unless the Crime be very atrocious, and then Severity is necessary. *l. perspicendum 11. in prin. ff. de penis.*

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F I N I S.

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OBSERVATIONS  
UPON THE XVIII.  
A C T  
PARLIAMENT XXIII.  
K. JAMES VI.  
AGAINST  
DISPOSITIONS  
Made in defraud of Creditors, &c.

By Sir *GEORGE MACKENZIE*  
of *Rosehaugh*.

The second Edition, Corrected, and in several Paragraphs much En-  
larged, by the Author himself ; before his Death.



E D I N B U R G H,

Printed by the Heirs and Successors of *Andrew Anderson*, Printer to  
the King's most Excellent Majesty. For Mr. *Andrew Symson* ;  
and are to be Sold by him, in the *Congate*, near the Foot of  
the *Horse-wynd*. Anno DOM. 1699.

A T

# EDINBURGH,

November 11. 1697.

**T**HE Lords of His Majesties Privy Council being informed, that Mr. *Andrew Symson*, Merchant Burgess of *Edinburgh*, has caused Print the Books following, *viz.* A new Edition of the *Laws and Customs of SCOTLAND*, in matters Criminal, by Sir *GEORGE MACKENZIE* of *Rosehaugh*; To which is now added by way of Appendix; a *Treatise of the Crimes of Mutilation and Dismembration; and of Retaliation by which it is punished; wherein several Questions concerning that Subject are discussed.* Item a new Edition of the *Observations upon the Act Eighteenth, Parliament twenty Third, K. JAMES the sixth, against Dispositions made in defraud of Creditors, &c.* By the said Sir *George Mackenzie* of *Rosehaugh*, Corrected, and in many Paragraphs much enlarged by the said Sir *George* himself. The saids Lords do hereby grant sole Power, Liberty and Warrant, to the said Mr. *Andrew Symson*, or such Persons as he shall appoint, to Print, Vend, and Sell the saids two Books; And discharge all other Persons whatsoever to Re-print, Vend, Sell or Import any of the saids Books for the space of Nineteen Years, after the Day and Date hereof, under the Penalty of five hundred Merks, to be payed to the said Mr. *Andrew Symson*, or his Assignes; by and attour the Confiscation of the saids Books to the said Mr. *Andrew*, for his use and behove. Extracted by me

GILB. ELIOT. *Cls. Sti. Concilii.*

## E R R A T A:

**P**Age 4. Line 1. for designed read dispon'd. P. 20. l. 9. f. As v; And l. 25. f. quart r. tract. P. 22. l. 20. dele h. 1. P. 24. l. 53. f. its as r. as it P. 25. l. 35. f. under r. that P. 28. l. 13. f. as is, r. as it is P. 41. l. 18. in some Copies f. Creditors r. Debtors l. 19. in some Copies f. Debtors r. Creditors. P. 49. l. 25. f. in all r. is all P. 49. l. 39. after Horning; insert for a Horning, l. 40. & 41. dele for a Horning P. 51. l. 23. f. qui vincit me r. qui vincit vincentem me l. 23. f. against me. r. against another. l. 24. f. against another, r. against me. P. 52. l. 48. f. for r. so P. 54. l. 18. f. in direct r. directed in P. 56. l. 21. f. a r. as P. 57. l. 5. f. Assysers r. Assisters l. 28. f. Canon r. Common P. 60. l. 8. f. for r. but As for Literal escapes which do not in the least mar the Sense, the Candid Reader is desir'd to excuse them.

TO

To the very  
WORTHY, HOPEFUL, and INGENIOUS young GENTLEMAN,

**GEORGE MACKENZIE**  
of *Rosehaugh*,

Only Son and Heir to the Honourable

**Sir GEORGE MACKENZIE**  
of *Rosehaugh*, deceased;

Late Lord Advocat to King *CHARLES II.* and King *JAMES VII.*  
and one of Their Majesties most Honourable Privy Council.

This second Edition of the Observations upon the 18 Act. Parl. 23. K.  
*James 6. against Dispositions made in defraud of Creditors, &c.* Corrected,  
and in several Paragraphs much enlarged by the Author, the same Sir  
*George Mackenzie* himself, before his Death;

Is with all due Respect humbly offered, by

( *Worthy Sir* )

Your most Humble Servant  
in all Duty.

ANDREW SYMSON.

AN



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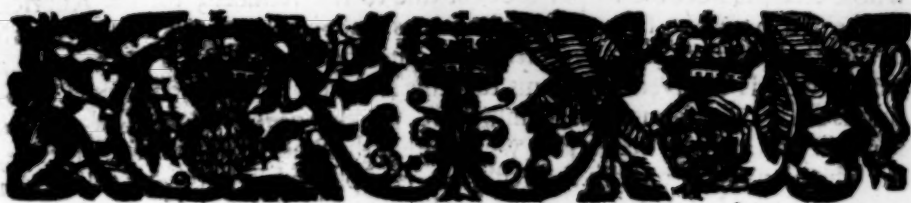
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ANDREW STANLEY

1871



AN  
EXPLICATION  
OF THE  
ACT of PARLIAMENT 1621.  
AGAINST  
**Bankrupts.**

The Words of the Rubrick, or Inscription of this ACT, are,  
*A Ratification of the Act of the Lords of Council and Session, made in July 1620  
against unlawful Dispositions, and Alienations, made by Dyvours and  
Bankrupts.*

**T**OR the better understanding of the Inscription or Rubrick, it  
is fit to know, that the Word *Bankrupt*, which is the Tran-  
slation of the Latine *Bancruptor*, is in the Original but a bar-  
barous Word, either derived from the French Word *Banque*,  
or the Italian *Banco*, and the Word *rumpere*: because when  
Merchants became Bankrupts, they broke, either the Seat upon which they  
did sit; or the Bank or Table, at which they did sit, as *Salmas.* observes, in  
*Pres. de usur. pag. 511. & de sen. trapezit. pag. 36.* But now the word *Banci-*  
*raptor*, is taken not only, *pro mensulario, foro cadente*, but for any Merchant,  
or any other person, who has contracted more Debt, than he is able to  
pay, as *Vegnern* observes. Page 10. They are called likewise *decoctores*,  
*quia rem suam coquendo diminunt.* *decoquere* signifying *diminvere*,  
*Bud. ad l. si hominem §, quoties ff. deposit.* In Italy they are called *falliti*, &  
*cessantes*, *Boer. decis. 215.* But in the Civil Law the true Latine word is *fran-*  
*datores*; *l. 4. ff. de curat. bon. dand.*

They are likewise by this Rubrick called *Dyvour*, or *Dyour*; from the Irish  
word *Dyer*, as I conceive, which signifies a knave; and they are likewise cal-  
led *hairman* in our Law, *l. burg. cap. hairman 144. & de jud. cap. hairman*  
*46.* Though our learned *Skew* does in *de verb. signif. verb.* *Dyvour*, make  
*Bankrupt* to be the same with him who has obtained a *cessio bonorum*, & *qui bo-*  
*nis cessit*: Yet these differ very much, for a Bankrupt is he only, *qui foro*  
*cessit: sed qui bonis cessit, forum retinet, & bona creditoribus in solutum dedit,*  
*Hottoman. de verb. sig. verb. cedere: cedere foro est falli, cedere bonis est juris,*  
and he only who has lost his estate by accident, without his own fault, was  
allowed *bonis cedere*; *bancruptor dicitur, qui dolo casuque non salvando factus*  
*est.* *Vegnern. p. 24* How the word Bankrupt is taken in this Act, may be  
justly doubted, for by the Rubrick of the Act, it would appear, that this Act

strickes only against Dispositions which are made by persons insolvent, and whose estate is not able to pay the debt due to the reducer; for the Rubrick of the Act bears, to be against Dispositions made by Bankrupts or Dyvours: so that these two, are made *pares termini*; and therefore, since a Dyvour is a person who is insolvent; it seems that this Act must only strike against Dispositions made by persons that are insolvent, *per argumentum à rubro ad nigrum*: for Lawyers are very clear, that where either the Rubrick is an intire sentence, or where any term used in the Rubrick, is explained by any equipollent, or exegetick word, that there the general term which is dubious, is to be interpret according to the import of both these terms; and therefore, since the word Dyvour is only applicable to persons insolvent, the word Bankrupt must be likewise interpret only of these; and so the Rubrick running only against Dispositions made by persons that are insolvent, it must follow, that only such deeds are reduceable, as are done to the prejudice of Creditors by a person that is insolvent. 2. This seems likewise consonant to reason; for if the Creditor can recover his debt, he is not prejudged, and so the design of the Act fails; and it were most unreasonable to trouble a person who has got a Disposition, except there be an absolute necessity. 3. This is most suitable to the common principles of Law, whereby *nunquam recurrendum ad remedium extraordinarium, quamdiu locus est ordinario*, no more than in Physick, a member should be cut off where it can be cured; and therefore, a Creditor who may recover payment by ordinary diligences, such as by the compysing, or arresting his Debtors Estate, ought not to be allowed to reduce all Dispositions made by his Debtor, since *omnes actiones rescissoria*, and particularly *actio Paulina*, sunt remedia extraordinaria whereby the Magistrate has been by cheats of Debtors, and the frau dulent Dispositions of such as contract with them, forced to rescind and annull the privat pactions of parties, contrary to the ordinar and general principles. 4. This seems to be further clear, by the narrative of the Act, which runs only against Dispositions which elude all execution of Justice, whereby Creditors are defrauded of all payment, and many honest families come to utter ruine; neither of which expressions are applicable to the case of Creditors, who may recover payment otherwise: Nor can the Disposer be said to have designed, to defraud his Creditors who having disposed only a part of his Estate, knew that he had still a sufficiency remaining to pay his Debt; And to reduce Deeds where there is neither *fraus ex parte dantis* nor *recipientis*, were to resolve this Act of Parliament in an Interdiction or Inhibition, and to make a man absolutely incapable, either to gratifie friends, or provide Children, though his Estate were never so opulent. 5. If this were sustained, it would also follow, that tho' the Disposer had a sufficient Estate at the time, yet if *ex eventu* he became Bankrupt at any time, all rights made by him without an onerous Cause, should be null, and so the negligence of the Creditors for onerous Causes, should prejudice those who were also true Creditors, though for gratuitous Rights, which were unjust. But on the other side, it is urged, that albeit the fraud of Bankrupts, gave occasion to the Act, yet the true design of it was to debar Debtors from alienating any part of their Estate in prejudice of their just Creditors, and accordingly it is declared, that the Lords will decern all Alienations and Rights made by the Debtor to any conjunct person without true, just and necessarie Causes, and without a just price really payed; The same being done after contracting of Debts from prior Creditors, to be null without farder Declarator, and the Act does not bear that all Rights made by Bankrupts should be null. 2. If the Act had run in these termes, it had been very uncertain, and had left the Matter very Arbitrary, for it might have been frequently doubted who could have been called Bankrupt. 3. If the receiver of the posterior gratuitous Right might prevail



to get the same sustained, by proving that the Debtor was solvent the time he granted that Right, then the prior Creditor would be obliged, to explicate the condition of his Debtors Estate which would be both very difficult for a Stranger, and too expensive to be put upon a true Creditor. 4. If there were any loss to be sustained *ex eventu*, it were far more just that the same should fall on conjunct and confident persons who have got a part of the Estate without an Onerous Cause, than on Strangers who have become Creditors *ex causa onerosa*. 5. By the Civil or Common Law to which this Act of Parliament relates, all Deeds done in fraud of Creditors are absolutely null, for by that Law this just Distinction was observed, *viz.* That if the second Right was made for a lucrative Cause it was revocable without considering whether the receiver was *particeps fraudis* if upon the event the Creditors were defrauded but in *titulo oneroso requiritur & fraud dantis & accipientis*, And so there was no necessity of discussing whether the Debtor was solvent; l. 6. §. 11. ff. l. 5. eod. h. t. 10. §. 1. h. t. and l. 79. ff. de reg. juris. vide Ferrier La juris prudence du digest. p. 479. And if the second Disposition be for an Onerous Cause, the Creditor seems not to be prejudged, for the price or Onerous Cause comes in place of the thing alienated and the Creditors may affect the one as well as the other, *Bargulus de dolo* p. 635: Num: 25. *Bartolus in l. qui a debitore ff. qui in fraudem Creditorum*, But there is a greater reason for it by our Law, than by the Civil Law, for our Law having only reduced such deeds as were made to Conjunct and Confident persons without an Onerous Cause; It is much juster that Conjunct persons should suffer than any else if there be not sufficiency of Estate *ex eventu* to pay such as were prior Creditors for an Onerous Cause. The Lords in their Decisions upon this point have inclined to sustain even Donations in favours of Conjunct persons, if the granter of the Right had sufficiency of Estate out of which the prior Creditors for Onerous Causes might be payed and thus they decided 11 March 1624 tho' *Haddington* declares himself of a contrarie Judgement the Bond being made there in favours of a Brother in Law; and 6 March 1632 *Garthland contra Ker*, where the Disposition was made in favours of a Grand-child; and the same was sustained betwixt the Husband and his Wife and her Sister, tho' a very eminent Lawyer who observed the Decisions has argued strongly against it, and declared his Judgement in favours of the Creditors 30 June 1675 *Clerk contra Stewart*. And in the case betwixt the Children and Creditors of *Mouswel* the Lords sustained Provisions made to Children, because the Father had a personal Estate tho' the Creditors were not obliged to know the same, and because he had a Wood standing upon the Ground, but whatever may be said in favours of a Conjunct person getting a Donation, where the Disposer has a visible Estate, the time that the Reduction is craved, far beyond the value of the Debt pursued for, so that the prior Creditor for an Onerous Cause can suffer nothing; yet I would incline to reduce all Gratuitous deeds made in prejudice of prior Creditors in favours of Conjunct and confident persons in these cases following.

1. If *ex eventu* the Creditor could recover no payment though there was sufficiency of Estate the time of the making the right, for certainly the design of the Act was to secure the Creditors against gratuitous Rights, and its much juster that conjunct and confident persons should lose, than meer Strangers who were prior Creditors for an Onerous Cause, nor is it absurd that though this Disposition might have been sustained at the beginning because there was a very opulent fortune then, it should yet thereafter become null, for many Rights become null *cum deveniunt in causam a qua incipere non poterint*, a clear instance whereof we have in our Law, in the case of Waird-lands, for tho' a Disposition and alienation of the lesser half of the Waird tenement will not infer recog-

nitition, yet if *ex post facto* the greater half be thereafter designed, then the Lands sold as the lesser half will also fall under Recognition. 2. Except there remain far more than is able to pay the prior Creditors even though for a lucrative Cause, I think the Right made to conjunct and confident persons should be reduced, for such Reductions are sustained at the instance of prior Creditors, tho' they be only Creditors *ex causa lucrativa* as shall be thereafter cleared: And it seems reasonable that there should be some distinction made betwixt prior Creditors who are such for onerous Causes, and those who became Creditors by meer Donations; The prior Creditors for Onerous Causes being still more favorable. 3. It seems hard to put such as were prior Creditors for onerous Causes to debate what was the Condition of their Debitor at the time he made the Disposition; And therefore to prevent the arbitrariness, this Act of Parliament seems to have declared, all Deeds made to conjunct and confident persons without a true onerous Cause, null at their instance, and certainly it is a prejudice to them to have any part of the Estate that might be affected by their diligence, substracted from it and given away by a meer Donation, and all rights are reduceable which are made to the prejudice of Creditors, nor makes the Law a Distinction whether the prejudice be great or small, nor could Limites be set against Arbitrariness, if such a Distinction were allowed. 4. It were most absurd to sustain Deeds done to the prejudice of prior Creditors for Onerous Causes, because the Disposer had a personal Estate, or other latent Rights which Creditors could not well know, and as there is no Obligation by the Act of Parliament upon Creditors to do diligence, against the common Debitor, and consequently it cannot be objected to them that they have not done Diligence; so why should it not rather be objected against those posterior Creditors by Donation, that they did not diligence against that personal or other Estate, for either they knew the Debitor had such an Estate or not, if they knew he had it they might have affected it, and if they knew it not they cannot defend themselves in having taken the posterior Donation upon the pretext that the Disposer had an Estate *aliunde* sufficient to pay his prior Creditors.

*Our Sovereign Lord, with advice and consent of the Estates:* The legislative power of Scotland consists in the Parliament, that is to say, the King and three Estates of Parliament; and though some think it more proper in our Law to say, *Our Sovereign Lord, and Estates of Parliament*, as in all the Statutes, or Acts of the 18. Par. Ja. 6. than to say, *Our Sovereign Lord, with advice & consent, &c.* yet conceive, the King Statutes, & they but consent, (though their consent be necessary) for his touching them with the scepter, and not the being voted, makes them Laws; and in England, the King statutes with consent of Parliament, and upon their supplication, and therefore I understand not Craig, who Diag. 8. affirms Statutes to be *constitutiones trium regni ordinum, cum consensu Principis*: for that is just to invert the statutory words of this, and many other Acts. Our old Acts being all past the last day of the Parliament, did not express the statuting power in every Act; for in effect they were all but branches of one Act, and run, *Item that &c.* and many of these Acts bear, *It is statute by the Parliament, and the King forbids*, as Acts, 13. 14. 1. Par. Ja. 1. which intimates, that though the Parliament statutes *suffragando & consentiendo*, yet the King only doth statute *sanciendo & prohibendo*. Sometimes our Acts bear, *It is Statute by the hail Parliament*; and sometimes, *It is statute & ordained*, without mentioning either King or Parliament; sometimes also they bear the determination of Parliament, without speaking of the King, which was either where the King was to perform what was statuted, as 23. Act, Pa. 1. Ja. 1. *It is Statute and Ordained, that our Sovereign Lord shall gar mend his money*, And by the 6. Act, 3. Par, Ja. 2. *The Estates has concluded, that the King shall ride thorow the Realme*; or else when the Estates are only to grant what

what is statuted, as in Commissions granted for uniting the two Kingdoms. But I find one Statute bear, the King statuting without mentioning the Estates of Parliament. viz. Act 19. *Self*, 1. *Pr. Cl.* 2. but this is but meer inadvertencie.

*Ratifies and Confirms an Act of the Lords of Session, &c.* This was original-ly an Act pass'd by the Lords of Session, when they do sit Judicially, at which time it is marked in their Books of *Sederunt*, such and such Men did sit. Thus the *H. brews* designed the Books of the Old Testament, by the first Words; and thus we still mark the Laws from the first words; and thus the old Books of our Law are called *Regiam Majestatem*, because they begin so.

His Majesty, at the first Institution of the Colledge of Justice, did allow the Lords of Session to conclude upon such Rules, Statutes and Ordinances, as shall be thought by them expedient to be observed and kept in their manner and order of proceeding, at all times, as they devise, conform to Reason, Equity and Justice, His Grace shall Ratifie and Approve the same. These are the Words of the 43. Act, 5. *Parl. Ja.* 5. To the which Act, I think this Act relates: but it would appear, both by that Act, and by the Power as here repeated, that the Lords of Session have only Power to make Orders relating to the Regulation of their own House, and to the Forms of Process. For this was indeed necessary for Explication of their Jurisdiction and possibly was implied in their very Constitution, without any express Warrant: *arg. l. 2. ff. de jurisdic.* But it seems that this general Power cannot authorize them to make Statutes, and Acts relating to the material Distribution of Justice; such as, that all Writs should be null, except subscribed before Witnesses, though they might have ordained, that Papers under the Hands of their own Clerks, should be so subscribed: for if they could make Statutes, as to any thing else besides the Forms of their own House, there needed no Parliament; for their Statutes might bind all the People in all things; And yet it may be objected, that by this Argument the Lords of Session could not have made this Law, declaring Contracts amongst the Leidges, to be null; that touching upon one of the Fundamentals of humane Society, albeit they might have declared such a Nullity, receivable by way of Exception, for that concerned only Form of Process. But the Answer to this is, that the Lords, in making this Act, did not introduce *jus novum*, a new Law; but only adapted to our Practice, the old Roman or Civil Law, which they might have followed in their Decisions, without making any new Act of *Sederunt*, as they do in most Cases where the Civil Law is founded upon Equity; as here; and where they are not determined by either our former Practice, or Constitutions; and by the same principle, both the Lords of Session, and the Parliament did in this Statute declare, that their said Act should extend to Causes depending, or to be intended; whereas Statutes regularly are extended only to future Cases; except where the Act declares what was Law formerly, as in this Case.

We may then conclude these Differences betwixt these Acts of *Sederunt*, and Acts of Parliament, that Acts of *Sederunt* can only be made concerning the Forms of Procedure, or to fix a constant Decision for the future, in Cases which they might have so decided, before their own Act: And it is their Prudence, and our Happiness, that they should rather decide in *Hypothesi*, than in *Thesi*. But Acts of Parliament should mainly be made to regulate new substantial Grounds of Justice and Commerce. But though this power of making Orders for administration of Justice, be properly, and principally their Province, yet they have in this but a cumulative Jurisdiction with the Parliament, who may & do likewise make such Orders, but the Parliament ought to do so sparingly, since Forms are better known to the Lords of Session, than to them and therefore, it seems that the power of making Acts relating to Forms, or of regulating Forms already made, belongs particularly to the Lords of Session, both because of their Constitution, and Experience. The Lords have been



in use not only to regulat their own Court by Acts of *Sederunt*; but they have by the same power prescribed Regulations to other Courts, and thus as to the Justice-Court in *anno*, 1591. years, they made an Act, that Women, and *socii criminis*, might be received Witnesses, in cases of Treason: and we find that they have likewise regulated inferior Courts, without any previous Warrant, as is clear by the 19. Act, 23. Par. 7a. 6. where the Parliament ratifies an Act of Secret Council and Session, which did Ordain and Command, that no Process should be granted before inferior Judges, on the first Summons, but upon libelled Precepts, and Citations of fifteen days warning. And in *anno* 1636. they made an Act of *Sederunt*, appointing, that no Consent of any Inferiour Court should bind the Consenter, except it were subscribed by himself, and that the Assertion of the Clerk of that Court was not sufficient. Nor should this Extention of their Power seem unwarrantable; for, since they may reduce the Decrees of Inferiour Courts, it seems most Consequential, that they may regulat their Procedure: But though the Lords of the Session pass the Bills before the Justices, and advocat Causes from before that Court, it may seem strange, that they should have power to make Acts of *Sederunt*, for regulating that Court, the Jurisdictions *Civil* and *Criminal*, being most distinct and different.

It may likewise seem, both by the former Act allowing the Lords of the Session this power, and the Ratification of their Statute specified in this Act, that it is necessary, that all the Acts of *Sederunt*, which relate not merely to the regulating their own Forms, should be ratified by the Parliament, though in the interim of Parliaments, these Acts should bind. And yet, *de facto*, we see very many Acts of *Sederunt* to have full Vigour, and Force, without any such Confirmation.

Before I begin to explain the Words of the Act of Parliament, I shall offer this Analysis of it.

Either the Creditors who are defrauded, are such Creditors as have done no Diligence, or such as have done Diligence: if they be such as have not done Diligence, then either the Dispositions quarrelled are made to conjunct persons, or not; if they be made to conjunct, or confident persons, either they are made for necessary and onerous Causes, or not; if they be made for a necessary and onerous Cause, they are valid, though made to conjunct or confident persons. 2. If these Dispositions be made without an onerous Cause, then either they remain with the conjunct or confident to whom they were made, or not; if they remain with him, they are reduceable, either by way of exception, or reply. But if any third party, no way partaker of the fraud, has lawfully purchast any of the Bankrupts Lands, for a just and true cause, then the Right is not quarrelable, but the receiver is only lyable to make the same forthcoming to the Bankrupts true Creditors. 3. The fraud is probable by writ, or Oath of the party receiver. 4. If the Creditors have done diligence by Inhibition, Horning, &c. Then the Bankrupt cannot in prejudice of these Creditors who have done diligence, dispone voluntarily any part of his Estate to defraud that diligence, in favours of another concreditor, who has done no diligence, or posterior diligence, or in favours of any interposed person to their behoof. And in this part of the Act, it is not considered, whether the interposed person be a person conjunct, or not. 5. The Bankrupts, the interposed persons, and all such as have assisted them, in advising, or practising these frauds, are declared infamous.

## Conform to the Civil and Canon Law, &c.

**B**Ecause the Act of Parliament and Act of *seuerunt* bear, that they have in this Act followed the Civil and Canon Law; We may justly assert that it were fit the Lords of Session understood exactly the Civil Law, and that it is the great foundation of our Laws and Forms. Thus we see, that *Robert Leslies* Heirs, are by the 69. Act, Parl. 6. K. Ja. 5. ordained to be forefaulted for the Crime of treason committed by their Father, according to the Civil Law; and forefaultor in absence, was allow'd by the Lords of Session, in Anno 1669. because it was conform to the Civil Law: and falsehood is ordained to be punished, according to the Civil and Canon Law, Act 22. Par. 5. Q. M. And that the Civil Law is our rule, where our own Statutes and Customes are silent, or deficient, is clear from our own Lawyers, as *Skeen, Annot. ad l. 1. R. M. c. 7. ver 2.* and by *Craig, l. 1. Diag. 2.* As also from our own Historians, *Lesly, l. 1. cap. lq. Scotor. Boet. l. 9 Hist. Camer. de Scot. Doctr. l. 2. cap. 4.* And the same is recorded of us by the Historians and Lawyers of other Nations, as *Forcari. lib 7. de gal. imper. Polid. lib. 1. Hist. Angl. Petg. di amittis Geograph. Europe ist. di Escoffe: and Duck, de anth. jnr. civ. lib. 2. cap. 10.* And though the Romans had some customs or forms peculiar to the Genius of their own nation: yet their Laws, in undecided cases, are of universal use. And as *Boet.* well observes, *Leges Romanas à Justiniano collectas tantâ ratione & sermonis venustate esse, ut nulla sit natio tam fera vel ab humanitate abhorrent: quâ eas non fuerit admirata.* And K. Ja. 5. was so much in love with the Civil Law, as *Boet.* observes, *lib. 17.* that he made an Act, that no man should succeed to a great Estate in *Scotland*, who did not understand the Civil Law, and erected two professions of it, one at *St. Andrews* and another at *Aberdeen*; and when K. James the first did by the 48. Act, 3. Parliament, ordain, that his Subjects should be governed by no foreign Laws, he designed not to deny the respect due to the Roman Laws, but to obviate the vain pretences of the Pope, whose Canons and Concessions were obtruded upon the people, as Law, by the Church men of these times.

It is also fit to know, that by the Civil Law many remedies were provided to secure Creditors against the cheats of their Debtors: As first, *Actio Pauliana*, so called either from *Paulus* the Prætor, who did introduce it, or from *Paulus* the Lawver, who did first advise it; by which Action Creditors might recall either the Estate moveable, or in moveable, disposed by their Debtor to their prejudice. 2. *Actio in factum*, by which *bona incorporalia*, such as *jura*, & *servitutes*, were recalled, when alienated, *l. 14. ff. quæ in fraudem creditorum.* 3. *Actio faviana*, whereby Patrons might revoke that which was done by their freed men, to the prejudice of that fourth part or *legitim* which was due to them by the Law. 4. *Actio faviana utilis*, by which Minors who were adopted or arrogated, might revoke what was done in prejudice of their fourth part due to them. But though *Snedwine* calls this *utilis faviana*, yet it is a mistake; for *Hottoman*, *Gomezius*, and others, do much more properly make this a *species Actionis Calvisiana*. 5. *Actio Calvisiana*, which was granted indifferently to Patrons and others. 6. *Edictum fraudatorium*, which was competent, when the Creditor was to revoke what the Debtor had alienated, and which belonged to another, and not to himself: as if a Tutor had alienated the goods belonging to his Pupil, which Pupil, and not himself, was Debtor.

The Action competent by the Civil Law, was<sup>r</sup> called *Actio revocatoria*, so called, because the Judge revoked what was done; and with us it is called an Action of Reduction, because the deeds so done are reduced or rescinded: And I find the word Reduction used by Civilians even in this sense, as by *Panormitan*, *Concilio secundo*, and others. And *reducere* does properly signify *in formam pristinam instaurare*, as is clear by *Ulp. l. 3. ff. de Itin. act. privato §. 15*. And therefore we have elegantly called this an Action of Reduction, because the Judge was to restore the things alienated in prejudice of the Creditor to its former condition, whereas the Reduction of Decrets was a term unknown to the Civil Law, they using only Appeals, and Revisions; but Reductions of Sentences is used amongst the Doctors, even in the same term and sense that we use it, as is clear by *Gail. lib. 1. observ. 149. & 150*. And the reason why it was necessary for Lawyers to introduce the necessity of such Reductions, or Revocations, was, because in the subtilty of Law, the alienation did *ipso jure transferre Dominum. l. si. sciens ff. de contra empt.* And therefore it is that if such Reductions be not raised before the years of Prescription, the Alienation it self is valid, though within that time it might have been rescinded by this Action of Reduction.

Though this Statute only declares all Alienations, Dispositions, Assignations and Translations whatsoever made by the Debtor, of any of his Lands, Teinds, Reversions, Actions, Debts, or Goods whatsoever, to be null; yet this is extended to Bonds granted, and to Tacks set by the Debtor, to the prejudice of his Creditor: for though neither Tacks, nor Bonds, be comprehended under the Letter of the Law, yet the same Parity of Reason, extends the Act to them; and in Laws which are founded upon the Principles of Reason, extensions from the same Principles are very natural, and in Laws which are introduced for obviating of Cheats, extensions are most necessary, because the same subtle and fraudulent Inclination which tempted the Debtor to cheat his Creditors, will easily tempt him likewise to cheat the Law, if the Wisdom and Prudence of the Judge did not meet him wherever he turned. And this is one of these Laws wherein the particulars specified, are set down rather as Examples than as Restrictions; and generally where the reason of the Law is express'd, that Law is to be extended to all the particulars to which the Reason express'd in the Law can reach, and the particulars are considered but as Examples and not as Restrictions unless there be some such taxative particle added as, *only, allanerly, &c.* which Rule holds beyond all Contraversies *in favorabilibus* such as this Act is, which is made to obviate Cheats and Frauds, but it has been doubted whether the same should hold *in correctoriis & penalibus*, as the 2. *Act. 9. P. K. J. 6* where because Forefeited persons are presumed to abstract their Writs and Evidents, therefore it is declar'd that the King shall not be oblig'd to produce Discharges for by past years: but seeing, that the Act of Parliament, specifies only the Case of Presentations, by which Lands holding of mediat Superiors are express'd, therefore it is doubted, and not yet decided, whether a person who has right to an Infeftment of Annualrents holding immediatly of the King out of the saids Lands can be excluded from bygone Annualrents, though the Reason of the Law extends, as strongly to these, as to Lands or Annualrents holding of other Superiors, in which case the King only presents. And even where the Reason is not express'd in the Law, our Decisions extend the same *ex ratione conjecturata, licet non expressa*; & *ex paritate rationis*, as in the 29. *Act. 5. P. Ja. 3.* whereby Bonds and several other personal Rights therein enumerated, are ordained to prescribe in forty years, which is extended to Decrets and Testaments. And by the 17, *Act. 6. P. Ja. 2.* Tacks of Lands set in favours of poor Labourers of the ground are secured against singular Successors, which is extended to Tacks of Salmond-fishing, and to Tacks of all o-  
ther



other Casualties. But yet Bonds, in so far as they are personal, do not prejudice the Creditor, nor fall they under this Statute: but only in so far as they tend to, and may be the ground of legall Alienation, by Comprizing, Poynding, or other diligence to the prejudice of the Creditors, and by affecting the Debtors Estate. By the word *Alienation*, is meant not only an exprest transferring of the Right, but any Act, whereby the *dominium* or Property is loosed to the Debtor, as if the Debtor should in prejudice of his Creditor, *habere rem pro derelicto ut alius eum occupet*, if he should relinquish any thing, upon design, that a conjunct or confident Person might possess it. Discharges likewise by the Debtor, of a Right competent to him, are reduceable upon this Act of Parliament, though the word *Discharges* be not exprest in the Act, for by the common Law, *Competebat Pauliana, quando Creditor liberabat Debitorem suum acceptilatione vel per pactum de non petendo*. Wherein l. 1. §. 2. ff. h. t. agrees with l. 5. *Basil.* направивши ти згодову.

I doubt not but upon the same parity of reason, if a Debtor suffered a Decreet to go against him, *dolose*, and connived so far in prejudice of his Creditor, as to omit a competent defence; but the Creditor might reduce that Decreet upon this Act of Parliament, if he could instruct the connivance and collusion, and verifie the defences that were omitted, but without this collusion were clearly instructed, it were very hard to reduce a Decreet at the instance of a party, who needed not to have been called.

I likewise think, that if the Debtor should in prejudice of his Creditor suffer the term to be circumduced against him for not compearing to depone, that Decreet were likewise reduceable: And this was so found at the instance of *Marjory Halzburtan contra Morison*, where though *Morison* was a singular Successor, and had got an Assignment to the Decreet obtained by collusion against *Watte*, by his Brother, yet the Lords ordained Witneses

before answer to be led for proving the collusion, and reponed *Watte* to his oath, and ordain'd him to depone. But the difficulty there would be, how a Debtor could be compelled to swear; and I doubt not but in this case if the collusion were offered to be proven by the oath of him who obtained the Decreet, that the Decreet would be reduced though the Debtor compeared not to depone: or if the Creditor pursued him, that *eo casu* he would be forced to depone, and that if he refused, personal Action would be obtained against him, l. 3. §. 1. h. t. which allows Action to the Creditors, *Si data opera ad iudicium non venerit* не явился на суд по договору.

Upon the same reason also, if my Debtor should by collusion prejudice his marches by a transaction, meerly to prejudice me who was to secure his Estate to my self by a diligence for my Debt; this transaction might be quarrel'd, as done in defraud of me his Creditor, which agrees with l. 23. *Basil. h. t.*

It is much debated amongst the Civilians, whether he is said to alienate in prejudice of his Creditors, who refuses to acquire an Estate that he might acquire, to the advantage of his Creditors: As for instance, if he refused to accept of a Legacy, or to enter Heir: it would appear to me, that by the common Law, *Actio Pauliana* extends not to these cases, as is clear per l. *quod autem ff. que in fraud qui autem cum possit aliquid querere, non id agit, ut acquirat ad hoc editum non pertinet* & §. 2. proinde & qui repudiavit Hereditatem vel Legitimum vel Testamentariam non est in eo casu. *hanc edito locum faciat*. And the ordinary distinction allowed by the Doctors in this case is, that *aut agitur de jure delato & questio, & hoc debitum questum Creditor repudiare non potest, aut agitur de jure non delato, aut saltem nondum questio licet delato, & non prohibetur illud repudiare*. But yet this decision of the Civil Law seems unreasonable, for since the Law was to secure Creditors, it was just that it should have secured them against all frauds, and what fraud is more malicious, than to ly out of an Estate by which the Creditor might be payed: or not to fulfil a condition, by

the fulfilling whereof, they might be put in a capacity to pay their Debt. And therefore our Law has much more justly by the 106. Act 7. Par. 3a. 5. allowed, that the Creditor may charge his Debtor to enter Heir, whereupon the Estate may be apprised from the appearand Heir, in the same way, and manner, as if he had entred Heir.

As also, by our Law, if a Legacy were left to my Debtor, and he designed to ly out of it meerly to prejudice me, who am his Creditor; yet our Law would secure me against this malice, either by allowing me to arrest the Legacy left in the hands of the Executor, if the Executor did confirm that Testament wherein my Legacy was left, and so I might establish a right to the said Legacy in my own person, by a Decreet to make furth-coming; or if the Executor should refuse or decline to confirm the Testament; I, the Legators Creditor, might confirm a third person *Executor dative*; and so in *omnem eventum*, secure my self against the fraud designed by my Debtor. But they are in a mistake who think that I could have confirmed my self *Executor Creditor* to the Defunct, for the Defunct was not my Debtor, though he left a Legacy to my Debtor. The question is yet harder with us, in conditional obligations, whereof I shall give two instances; one is, if by contract betwixt my Debtor and *Titius*, *Titius* were obliged to pay my Debtor 5000 merks; and upon the payment thereof, my Debtor were obliged to confirm *Titius* as his Vassal, but my Debtor finding that the said 5000. merks would accres to me, should upon that head decline to fulfil. The question is, how could I settle in my own Person a right to the said 5000. merks? And it is thought that the proper way were to comprise from my Debtor, that right by which he could have confirmed *Titius*; and having thus put my self in a condition to fulfil the condition upon which the 5000 merks was payable, I could either arrest the money in *Titius* hand, and force him to make it forth-coming or else pursue an ordinary action against him, wherein I would conclude that he being obliged to pay 5000 merks to my Debtor, upon obtaining a confirmation from him, should be now decerned to pay me the said 5000. merks as having come in place of his said Creditor, by having comprised his right and so being capable to perform, and fulfil the condition whereupon the said 5000 merks was payable. But its thought that the last part of the Alternative will not hold, *viz.* that there may be a personal Action for payment; and that because, albeit the Creditor having comprised the right whereupon he may confirm, may fulfil the condition, yet he cannot have right to the conditional obligation, so that he may pursue for payment. unless it be settled in his Person by comprising, arrestment, or some other legal diligence.

The second case is, if *Titius* be obliged to pay my Debtor 5000 merks, upon condition that my Debtor should build him a House: The question is, how I, if my Debtor be unwilling to fulfil, can establish a right to the said sum in my own Person.

To vvhich it may be answered, that either my Debtor was obliged expressely by way of mutual Contract, to build the said House to *Titius*: And then some think, that I may force *Titius* to Assign me to the Contract, and thereby I will force my Debtor to fulfill his part; but yet I see not how he may be forced to assign me, or from what that Obligation can be inferred. Others think, that I may arrest, and if when I pursue to make forth-coming, *Titius* shall alledge that he cannot pay until the condition be fulfilled. I may cleid that Allegiance by this Reply, *viz. sibi imputet*, that he did not obtain the Implement of that Condition by registering the Contract, and forcing my Debtor to fulfil. But I think the foresaid Reply, *sibi imputet*, would not be relevant, seing the Debtor is secure; and it cannot be imputed to him that he did not pursue for implement, and as the Creditor of the conditional Debitor.

bitor would not be heard to say *sibi imputet*, so this Creditor who can be in no better case; cannot reply upon *sibi imputet*.

But if my Debtor was not expressly obliged to build the said House, and that *Titius* was only bound to pay 5000 Merks, when my Debtor should build him such a House. I conceive that *eo casu*, if my said Debtor designed to defraud me by not fulfilling the Condition; our Law would allow me no Remedy.

## To be intended by any true Creditor.

**A** Creditor is he to whom we owe any thing; against which we cannot defend our selves by a perpetual Exception. *Παισις εστι, ο εσται αδικας αδικας* *Χρησ διανεστος παρρησιος χρεοςυμπος.* *Basil. de verb. signif. l. 10.*

1. By these Words it clearly appears, that this Action is competent to all Creditors, whether they were Creditors for an onerous Cause, or not. For though it would appear by the Narrative, that this Law was only designed to secure such as were Creditors for an onerous Cause; and albeit it would seem that the only Reason why that this Law was introduced, was wanting here; since the Creditor did not lend out of his Money in this case, in Contemplation of his Debtors Estate: Yet since in the construction of Law, even Donations are good Rights, and the person to whom they are made, becomes thereby Creditor; *etiam donatarius est Creditor*, (except in the case where the Donation was revocable) therefore this Action is likewise competent to them; and so it has been oft decided in our Law: And particularly 15. July 1675. *Alexander contra Lunnie*, where there being two Assignations made, and the last being first intimated, the first Assignee raised a Reduction of the last Assignation upon the Act of Parliament 1621. & it was found that tho' the posterior Assignation first intimated, was the preferable Right so long as it stood, yet it was reduceable upon the Warrandice express'd or implied in the first Assignation, unless the posterior Assignation had been for onerous Causes.

2. Though Creditors whose Term of payment is not come, differ from such whose Debt is suspended by some condition, the one being called *Creditor conditionalis*, and the other *Creditor in diem*; which two differ both by the Civil Law, and ours; yet whether either of them be comprehended under the general Word Creditor, where that word is used in Statutes, is much debated. *Cagn. ad l. 1. ff. Si certum petetur* is of opinion, that these are not true Creditors, because a Debtor is he who may be forced to pay, *l. Debitor ff. de verb. signif.* with which Law the *Basilicks* do agree, for *l. 66. tit. Basil. de Reg. jur. l. si quis ex hoc pacto pignus sit* *χρεοςυμπος*, but so it is that he who owes to a day, or under a Condition, cannot be forced to pay.

3. The Law called a conditional Debt, the hope only of a Debt. §. *Ex conditionalis iust. de verb. obl.* 3. These are called Creditors in this Title, *quibus ex quacunque causa cum debitore est actio*, but so it is that before the condition be purified, or the Term of payment, there can be no Action, *l. cedere diem*, & *l. Creditores ff. de verb. signif.* But yet on the other hand, these are both Creditors, because the Law makes Creditor to be genus, the species whereof is *Creditor purus*, *Creditor in diem*, & *Creditor sub conditione*, *l. Creditores ff. de verb. signif.* 2. It is clear per *l. in Leg. Aquil. 40. ff. ad l. Aquil.* That a conditional Creditor may pursue to have his Debt payed, or secured, when the Term comes, though it be not yet come. 3. *Ille vere est Creditor, qui perpetua exceptione non potest removeri*, *l. creditores, ff. de verb. signif.* But so it is, that neither Creditor *in diem*,



*diem*, nor Creditor *sub conditione*, *poteſt perpetua exceptione removeri*. 4. In Reason it appears, that ſince when the condition is purified, the Condition is drawn back to the date of the Contract; that therefore the conditional Creditor hath this remedy competent to him, *glos in d. §. ſi quis in fraudem*.

This Action then, is competent to Creditors, to whom a Debt is conditionally owing; but is not to take effect until the Condition be purified. As for inſtance, if *Titius* ſell me his Lands with abſolute Warrantice, and thereafter diſpoſe any part of his Eſtate, to a conjunct, or confident Perſon, without an onerous Cauſe, I might reduce that Alienation as done in defraud of me, though the Lands ſold to me were not evicted, and ſo the Warrantice did not actually take place. Which caſe though it be not expreſſly decided in our Law, yet I find a Reduction *ex capite inhibitionis* ſuſtained in thir very terms, but with this juſt caution, *viz.* That the Reduction ſhould take no place till diſtreſſes ſhould follow, which is likewiſe decided by the Civil Law, *l. potior ff. qui potiores in pig. §. 1.* where alſo the former Caution is uſed, *ubi conditio purificata eſt, ibi conditio retrahitur*.

3. This Action is even competent to theſe Creditors whoſe Term of payment is not come, though it may ſeem, that till then they are not true Creditors. The reaſon why both the Civil Law, & ours allow Reductions in theſe caſes is commonly thought to be, leaſt the Creditor to whom the Alienation is made, become *inſolvent*, and ſo the Action of Reduction, if delayed till then, would then become uſeleſs. But if the Lands or others diſpoſed, be ſtill in their hands, it does not import whether they be inſolvent or not, ſeing Reductions are *in rem*, and do affect the Right diſpoſed, whatever be the Condition of the Perſon who receiveth the Right; and if they be diſpoſed to a third perſon for an onerous cauſe, the Reduction cannot be effectual; and for obviating that prejudice, the Creditor may inhibit. The true reaſon then for ſuſtaining Reductions at the inſtance of Creditors *in diem*, or *sub conditione*, is, that though perſonal Actions for payment, are not competent to ſuch Creditors before the day, or the Condition exiſt, yet they may obtain Declarator, that notwithstanding of ſuch fraudulent Rights, their Bonds ſhall be effectual to them, and their Debtors Eſtates lyable to them, and to Execution at their inſtance, as if thoſe Rights were not granted, and upon the matter, Reductions are nothing elſe but Declarators to the effect foreſaid.

4. By the common Law, ſuch as were Creditors *ex delicto*, had this Remedy, which though ſome Lawyers have contradicted, yet it is moſt clear in my opinion; *l. 12. ff. de verb. ſig. ſed et ſi ex delicto debeat, mihi videtur poſſe creditores loco accipi*. For though he only is a Creditor, whoſe faith we have followed, *l. 1 ff. ſi certum petat*: And that the Party injured cannot be ſaid to have followed the Faith of the Injurer, yet that Law expreſſes only one Quality of a Creditor; and there are many Creditors whoſe Faith we have not followed. And yet I have ſeen this debated in our Law, February 1674. *Lindsay contra Gray of Hayſtown*, in which Purſuit a Reduction was raiſed by *Lindsay* againſt *Hayſtown*, of a Diſpoſition made to *Hayſtown* by him who had murdered her Husband, after the Murder committed, to the prejudice of the Aſſythment due to her, and thereafter decerned to her by the Exchequer: From which Reduction the Lords aſſoiled, becauſe *Hayſtown* was not obliged in Law to know of the Murder, nor did any Register put him in *mala fide*, and ſingular Succeſſors are only obliged to ſeek the Registers; and ſhe having only the Gift of the Murderers Elcheat ( he being denounced in abſence ) for ſatisfaction of the Aſſythment due to her; the Lords found ſhe might purſue Declarators of Elcheat, but could not purſue real Actions.

And

And generally with us in *Scotland*, he who commits a Crime, is either only denounced Fugitive, and in that case, his Escheat only falls, or he gets a Remission, and then there is an Assythment due, but in neither of these cases Reductions upon this Statute are sustained, or else the Murderer dies, and then nothing is due even by way of Assythment with us. But this first seems unreasonable, or at least severe, for if a person should commit a Crime against me, and should thereafter to defraud me of that Assythment, and just Reparation that were due to me, dispoise his Estate to a conjunct or confident Person; It seems very unjust that I should be disappointed of my just Satisfaction by this voluntary Deed of his. And as this is not suitable to the Principles of Equity, and Justice; so neither seems it suitable to the Principles of Law, for *tantum facit quis delinquendo, quantum facit se obligando*, and therefore as I could have reduced any such voluntar Alienation, if another had expressly obliged himself to me, so ought I to have the same Benefit when another has committed a Crime against me: And if we consider seriously the Principles of either the Civil, or our Municipal Law; we will find; that not only are Creditors *ex delicto* looked upon as Creditors, but that they have *πρωτογενεια*, or *jus prelacionis* to all other Creditors, in so far as concerns the necessary Reparations. And thus it is with us expressly declared by the 75. Act 14. Par. K. Ja. 2. and the 174. Act 13. Par. Ja. 6. that all Remissions, or Respits granted to any person till the Party Skaithed be first satisfied, shall be null. And by the 26. Act. 1. Par. Ch. 2. The Party from whom Goods are stolen, are to have Reparation out of the first, and readiest of the Thiefs Goods. And the last part, *viz.* that nothing is due by way of Assythment where the guilty person suffers, seems unreasonable for the Heirs of the person injured being put to great Expenses in the Pursuit oft times, and the Wife, and Children, being oft times beggar'd by the death of the person killed, it is unjust that they should have no Reparation; and the Offenders Death satisfies publick Justice, but not them. And I love better the Laws of *Spain* and *France*, which allows Reparation even where the Offender dyes.

For the better understanding of the general Point, how far the Fisk becomes a Creditor, by the common Law, upon the Commission of a Crime, and so may reduce posterior Dispositions; It will be fit to distinguish these Cases, first, before the Crime be committed, the Fisk has no Interest to reduce any Disposition made by any person whatsoever, except the Committer had dispoised his Estate, upon design to disappoint the Fisk when the Crime should be committed; As for instance, if a person who designed to run in to the Enemy, or to kill the King, should immediatly before dispoise his Estate; I conceive that Disposition would be quarrellable, as done in *frandem fisci*. If this *animus committendi crimen, & fraudandi fiscum*, could be made appear, by these, or such like Presumptions, *viz.* If the Disposer did immediatly before the committing of the Crime, and without any onerous cause, grant the said Disposition, and made a Disposition *omnium bonorum*; for a particular Disposition of any small part, though made immediatly before, and though *gratuitous*, could hardly be quarrelable *ex hoc capite*. 2. If the Receiver of the Disposition was conscious to the Disponers design of committing the Crime, then if the Crime was Treason, the Receiver is guilty of the Crime, and so the Disposition, and all the Receivers own Estate falls to the Fisk. And in these Crimes a Disposition made to one who was conscious to the Design, makes the Disposition quarrelable whether it be made for an onerous Cause, or not, or whether it be *omnium bonorum*, or not. 3. As to Dispositions made after the Crime is committed, we must distinguish thus, *viz.* either the Crime committed is Treason, and all Dispositions made after the per-

petrating of this Crime are null, though before Citation, or Condemnation, but there must still ensue a Sentence, which Sentence is drawn back to the committing of the Crime. 4. In other Crimes, Dispositions are either of Heretage, or Moveables; As to Heretage, no Disposition is quarrelable, because no Crime confiscats Heretage, except Treason. And yet *quoad* Assythments to the Party wronged, I think there is in reason ( though our Law allows it not ) so far *jus quasitum*, to them, that they may quarrel all gratuitous Dispositions, though made before Citation, as made to their prejudice; who became lawful Creditors by the Injury suffered in the same Crime: but if the Disposition was for an onerous cause, I conceive it cannot be reduced *ex hoc capite*, or affected with the subsequent Assythment because the Buyer was *in bona fide* to buy, finding nothing against him in the Register of Hornings, or Inhibitions. And that though he knew the Disposer had committed the Crime, because he was not obliged thereby to know that he was incapacitated in Law to dispoise. 5. In other Crimes, besides Treason, Dispositions of Moveables are quarrelable by the Fisk, if made after Sentence, and it may be, if after the party was cited for the Crime, if the Crime was such as did confiscat Moveables. For though *regulariter post commissum crimen, valet alienatio ante sententiam facta titulo oneroso neque revocatur nisi appareat contrahentium fraud.* Angel. Ad. l. 1. Siquis C. de bon. proscript, yet there lies still a presumption, that all Dispositions made after an accusation are made *metu justa pena*. Picus ad l. post contract. And all Lawyers are of opinion, that in neither of these cases, a delinquent may pay his former Creditors: And it is a received opinion amongst us that all Crimes which are capital do confiscate the committers Moveables, though there be no Act appointing that confiscation, as a part of the punishment, because Moveables, *sequuntur personam*. And thus in the case of *Waghin Selkirk*; The Lords found his Moveables to fall under Escheat for Theft, though there be no expresse Statute confiscating the Moveables for Theft. But though this be followed in some particular Nations, as France *Ultrad. Consil. 17.* yet *Clarus* tells us, in *Quest. 78.* that *de consuetudine totus mundus servat quod bona mobilia non confiscantur nisi ex dispositione statuti, vel consuetudinis, excepto crimine Hæresis, & lesa Majestatis.* And particularly in Theft, *Bossius* is clear, that the Moveables are not Escheat *nisi vigore statuti*. And why with us should it be declared by some Acts, that the Committers Life or Goods shall be in the Kings will, and in others, that the committers Moveables shall be Escheat to the King, if this hold in all cases? 6. Where the committer is declared punishable by confiscation of his goods, and his goods are confiscated *ipso jure*, there even after the committing of the Crime some think, that the committer can dispoise no part of his Moveables, even before denunciation or citation. That being the effect of confiscation *ipso jure*, as is clear by the above cited Doctors. And it would appear, that confiscation *ipso jure*, must import somewhat more than the confiscation that results only consequentially from the nature of the deed itself. For else why needed the Law expresse this; and if the Law has confiscated them at the time when the Crime was committed, it would appear that the *dominium* is thereby transferred to the Fisk, and that consequently the committer is divested of them, *nam duo non possunt esse domini in solidum*. And if the committer be thereby divested of the property, he cannot dispoise for none can dispoise but he who is proprietor. And yet even in that case the person injured, should have still action for his damage, and interest, for he is more prejudged by the Crime, than the Fisk; and consequently it is not just that he should be excluded by the Fisk, since the Fisk has only interest by him, and by the wrong which he has suffered. But I refer the reader to *Perigrinus, De jure fisci*, who has treated this question most learnedly.



5. This action is not only competent to the Creditor himself, but to the Creditors Heir, for *hæres & defunctus sunt in jure, una & eadem persona*, and not only is it competent to the Creditors Heirs, but in many cases, it is competent to his singular Successor, to whom either the Right is assigned, or who becomes singular Successor, *ratione rei*, as Donators to Elcheats, and Forefaulters, &c. as was found. *March 1636.* 6. The Defuncts Creditors are allowed to reduce Alienations made to the prejudice of appearand Heirs, upon death-bed, when these Heirs were their Debtors, for though this privilege seems only introduced in favours of appearand Heirs, yet their Creditors may comprise from them *omne jus quod in iis est*, and to reduce, as having comprised, as was found at the instance of *Balmerinochs Creditors contra the Lady Coupar*, and the 4th *January, 1672. Roxburgh contra Beatty.* And in this case it was found that even Creditors might pursue Declaratours and Reductions, upon this Act, though they had not yet Apprised, albeit it was then alledged, that none has interest by our Law to pursue Reduction of a Real Right, except such as have a real Right standing in their person to the Lands, whereof they crave the Right to be reduced. It is in some cases, not only competent to such as were Creditors before the alienation quarrelled was made, but even to such as were *Creditores futuri*, and became Creditors only after the Alienation quarrelled was made. And the Civilians mention two cases wherein this Action is competent even to such as were not Creditors the time of the Disposition quarrelled: The first is, if the Disposer designed to borrow money before he made the fraudulent Alienation, and did borrow the money upon design to break with it, for there though the Reducer was not a true Creditor, the time of the Alienation, yet the fraudulent inclination respecting expressly this Creditor, or the borrowing of the money; made the Disposition revocable and reduceable. *Jason ad jnst. hoc tit. num 6.* but here the design must be expressly proven, or at least must be necessarily inferred from convincing circumstances, and presumptions. The second case mentioned by them, is, if the Creditor did lend the money for paying prior Creditors; In which case, as they might have reduced the deed done in their prejudice, so may the posterior Creditors, since they come in place of the Creditors whom they payed; & *surrogatum sapit naturam surrogati.* But this last case does not (for ought I remember) take place in our Law, and seems not at all suitable to the Analogy of our Law in other cases; for else he who had lent money to pay sums due upon an Inhibition, would have right to the Inhibition, or he who lent money to pay off Comprysings, or Arrestments, without being expressly assigned to either. And therefore I conceive, that either the Creditor who payes the Creditors who were prior to the Alienation, takes assignations to these prior Debts which these pays, and then they may reduce deeds done to the prejudice of the first Debt, or else he pays only the money to the Debitor, and the Debitor pays the prior Creditors which is the case meant by the Doctors here, and in this case I conceive, the Creditor who so pays, would not have the privilege, and that because the Debt which only had the privilege is extinguishd, & *non entis nulla sunt qualitates*, nor can the Maxim, *surrogatum sapit naturam surrogati*, take place here, seeing that the Debt in whose place it is surrogat, became extinct before the surrogation: and none of the parties could design to transmit this privilege, else the payer had taken Assignation; nor can he complain since *sibi imputet*, who did not that which he might have done for securing himself. As to the first of these cases, there was a famous decision extending thir Reductions even to posterior Creditors, 2. *July, 1673.* at the instance of *Street*, and *Jackson*, English-men; against *James Mason*. The case whereof was this

*James Mason* having dispon'd his Lands to *James Mason* his Son, the said *Street* and *Jackson* raised a Reduction of the sons right, as granted in prejudice of them, who were lawfull Creditors to him, by vertue of a Trade and correspondence which was begun long before the Alienation; though the Bonds wherein he became Debitor to them were of a date posterior to the Alienation. To which it was answered, that the ground of the Debt, being a Bond, and the Bond being posterior to the Alienation, they were not Creditors at the time of the Alienation; and consequently the Alienation was not reduceable upon this Act of Parliament 1621. To which it was replied, that this pursuit was not founded upon this Act 1621. only, but upon the sure principles of the common Law, according to which the Lords used to decide before this Statute was made, and according to which, they are warranted to proceed by this Statute in cases that are new. Though the Debt was not constitute till after the Infeftment was granted, yet the pursuers having long before that time entred in a Trade with *Mason*, they did *bona fide* continue that Trade without any interruption, and under the colour of that Trade he had most fraudulently bought with their moneys this Land, and did most fraudulently convey the same to his Son to their prejudice. Which did clearly infer a designed fraud in the Father. and tended inevitably to ruine all Trade and Commerce which might be very easily disappointed by such fraudulent conveyances as this. Upon which debate the Lords ordained *James Mason*, the Fathers count book to be produced, that it might appear in what condition he was at the time when he made that Disposition to his Son; And whether the same was granted upon design to frustrate his Creditors, or not, likewise they allowed Witnesses to be adduced for either party, for clearing the Lords how far the Trade was continued betwixt the Father and those pursuers, before, and after the Sons right; After making of which report, the cause being again called, it was urged for the pursuer, that by the report it was clear that there was a former Trade, and correspondence betwixt them, prior to the Sons Infeftment, during all which time he oftentimes sold cheaper than he bought; and that when he went to take the Infeftment for his Son, he disguised himself, and rode from, and to the Land, in a by-way, and caused so mark the Seasing in the Minut-book, that no man could know but that the Seasing was taken for the Father, and after the Seasing was taken the Father still remained in actual possession. From all which it was argued, 1. That *Mason* elder having entered into a publick and uninterrupted Trade, and correspondence with the pursuers, the said Trade is to be considered with respect to its first beginning, and the Bonds though posterior to the Infeftment, yet are to be drawn back ad *suam causam*, viz. the Trade and Commerce from which they did result. 2. It was clear from the Nature of Commerce in general, and from this report in particular, that former payments were still made the foundation of new credit: And if the making of such Rights during the dependance of such a continued Trade were allowed in favours of Children; no Merchant would give trust, or if they gave, they might be ruined by it, both which would be equally destructive to Trade, 3. If we consider the Analogy of our Law, we will find, that the Lords have still considered a continued, and uninterrupted Trade as very privileged in many cases; And therefore though other compts prescribe in three years, yet that Statute uses not to be extended to a continued Trade and correspondence, and so far have *privilegia mercatorum, & commercii*, been allowed in our Law, that Bills of exchange are allowed though wanting the ordinary, and Statutory solemnities of Witnesses and Warrants; for payment of Bills of Exchange are sustained without the solemnity of intimation, against posterior Assignayes, and Arresters: and Annualrent is sustained betwixt Merchants, *sine pacto, vel lege*

lege, and a Bills subscribed only by a mark, without either the subscribers intire name, or the initial letters of it, was sustained, it being proven that the drawer of the Bill was in use so to subscribe. 4. By the common Law, *Actio Pauliana* was extended even to posterior Creditors, where *animus fraudandi*, prior to the Alienation did appear, either by Writ or Presumption, which are enumerated by *Jason*, *ad Inst. hic*; and are very far short of the Presumptions formerly condescended on: and if the common Law, and natural reason allowed this remedy in the case of Debts absolutely posterior; how much more ought it to be allowed in this case, where the Debt, which is the ground of this pursuit, depended on a prior cause and was the result & product of a correspondence entered into, before granting of the Sons Infeftment. 5. The Father had no Estate before this correspondence, and having drawn fraudulently into his hands the pursuers goods, about the same time that he bought the Land, Law & reason presumes that the price of their goods, did pay the price of thir Lands: And that therefore this Land ought to be affected and burdened with their debts. To which it was duplyed 1. That though the common Law did allow *Actio Pauliana* to posterior Creditors, yet that was only in the case where the receivers of such Rights were *participes fraudis* which cannot be alledged here, since the Son was minor, *nec doli capax*, and that especially being introduced *in odium* of the collusion it cannot be extended to cases, where no Collusion, can be alledged upon the receivers part. 2. Commerce and Trade is founded upon personal trust, and Merchants follow the faith of those vvith vvhom they trade, without ever considering what real Estate they have; so that thir pursuers cannot be said to have been cheated in their expectation, since they cannot be said to have furnished their goods, in contemplation of the real Estate now contraverted. 3. Either thir pursuers did search the Registers or not; if they did, not *sibi imputent, qui sibi non vigilarunt*; and if they did, they would have found that the Son was Infeft, his Infeftment being Registerate, and though the minute book did not specify, whether the Sealing was granted to *Mason* elder, or younger, yet they ought to have searched the Register it self, whereof this is appointed to be but an Index, and the Son not having been *particeps fraudis* could not, have been prejudged by any cheat or contrivance of his father: for the *jus quassium* to him by the Infeftment, *sine facto suo, ab eo auferri nequit*. 4. The pursuers did innovat their accompts by taking Bond for the product, and *Mason* had a Discharge of all former accounts and trade: so that at the time of the Disposition, he was not their Debitor upon the accompt of any prior Trade; and the pursuers were no more to be considered as Merchants, but as common Creditors: And it vvore a very dangerous consequence, to make Debts that are innovated, retain all the priviledges that they had *ante innovationem*, & *per novationem prior obligatio perimitur. l. i. ff. de Novationibus*. 5. It can be made appear, that *Mason* had other Trade, vvwhich vvould have furnished him the price of the Land, and that he vvwas losser by the pursuers, Trade. To vvwhich it vvwas triplyed, that the common Law did only consider *participes fraudis*, in order to another effect, *viz.* if the Alienation vvwas *ex causa onerosa*, then the Alienation could not have been reduced; unless the receiver had been *particeps fraudis*; but vvwhere it is *ex causa mera lucrativa*, as in this case, *fraus in eventu* vvwas sufficient. And even here the Disposition being made by the Father to his ovvn Son vvho vvwas in *familia*, the Son vvwas in as ill condition, as if he had been *particeps fraudis*: nor could he plead the same benefit as a stranger, contracting *bona fide*. Upon vvwhich debate, the Lords did reduce the Disposition, as being made to the Son, by the Father, who was a Merchant, during his dublick Trade and correspondence. Which Disposition could have no other rational designe, but to cheat Creditors, the Father not having so much as reserved himself a liferent, or power to redeem. But since the Lords declared that this Decision proceed-



ted upon all these grounds joynly, it can hardly be extended to other cases. And I find that this publick interest, and advantage of Trade and Commerce, has been sustained to reduce deeds done to the prejudice thereof : but yet not upon this Act, and Statute, but upon the general ground of fraud, inferred by most pregnant qualifications, as is clear by the Decision betwixt *Pot* and *Pollock*, 12. Feb. 1669. The case whereof was this, *John Pollock* being Debitor to his Wife of a second Marriage, for her life-rent provision, and to others to whom he owed money, they apprised his Estate, and assigned their Rights to *Pot*, who thereupon intends Reduction of a Bond granted by the Defunct to *James Pollock* his Son of the first Marriage, for 5000. merks. The reasons of Reduction were, first, that this Bond was granted by a Father to his own Son, without an onerous Cause. To which it was answered, that they not being Creditors when this Bond was granted, this Act of Parliament allowed them no Reduction of it, for this Act is only conceived in favours of prior Creditors, and since his Father might have gifted away his Estate to a stranger, and even that gift could not be quarreled by posterior Creditors, because they had not then interest, and so their interest could not be said to be prejudged, there was no speciality as to him, why he might not be capable of the same Donation ; And whereas it was alledged, that this would ruine Commerce, because a Father might grant such a right, and thereafter keep it latent, and cheat his Creditors with whom he Traded, who could not know the condition of the Defunct. To this it was answered, that the Act 1621. introduced no such speciality in favours of Trade, but upon the contrair, such Dispositions when made by Merchants, were lesse presumeable to be done in defraud of Creditors, than when made by such as had no Trade, nor Commerce, because Traders might grant Bonds to their Children, in expectation of what they might gain, and when they fell thereafter *insolvent*, that might be imputed to their losse by Sea, or Trade, and not to the Donation in favours of children. Upon which debate, the Lords repelled the reason founded upon the Act 1621. The 2. reason was, that this Bond was reduceable *ex capiti doli*, as granted by collusion betwixt Father, and Son, in *neccm Creditorum*, and to defraud their just interest : which *dole*, and fraud, was infered from these circumstances, 1. That the Son being *foris familiat*, and provided, it could not be granted for any onerous Cause. 2. The Bond was kept latent till the Father dyed. 3. It did bear no Annualrent, and the Term of payment was delayed till after the Fathers death. 4. Their Debts were all contracted immediatly after the granting of this Bond ; so that it appeared clearly, that he had designed to exhaust his Estate by this Bond in favours of his Son, and then to contract Debt freely, and to apply their money to the payment of this Bond. Upon which qualifications of fraud, the Lords reduced the Bond. The third reason was, that this Bond granted by a Father to a Son, was but a *legitim* or *portion natural*, in the construction of Law, and therefore was revocable by the Father, and consequently by his Creditors ; and *legitims* did only affect the Defuncts free Gear ; which reason was also justly repelled, for this being a Bond granted to a son, who was *foris familiat*, and being delivered to himself, was found not to be of the nature of a *Legitim*. First, because it did not bear to be in satisfaction of his *portion natural*. And secondly, because it was an ordinary Bond, and delivered in the ordinary vway.

I find like vways a second case, decided in favours of posterior Creditors 28. Novemb. 1679. *Cathcart* contra *Glas*, wherein *Cathcart* having raised a Reduction of a Disposition made by *Glas* to his Brother in Law. it was alledged that the Disposition was prior to any Decreet obtained at the instance of *Cathcart*, by which Decreet only he became Creditor : To which it was replied that

that though the Decreet was posterior to the Disposition, yet the Debt and Process thereupon was prior. 2. The Brother in Law was *particeps fraudis* in so far as one of the Brothers-in-Law being but a Shoemaker had lately taken up a trade of bringing over seeds from Holland and having sold rotten seeds to this pursuer, for which the process was rais'd, he to defraud these whom he should cheat by this Commerce made this Disposition to his Brother in Law. The Lords, upon this Debate, found the reason of Reduction, thus qualified, relevant *viz.* that either the Bargain for the seeds was prior to the Disposition, or that the Disposition it self, tho posterior, was granted to a Brother-in-Law *animo fraudandi* & to the behove of the Granter, but this they found only probable *Scripto vel juramento partis*, or by such pregnant Presumptions and Evidences, as might necessarily infer that there was a fraud.

There was a third case decided 4th. Decemb. 1673. Wherein the Lords reduced a Disposition granted by Reid of Daldilling to his son, even at the Instance of posterior Creditors, in respect that the Right was base, and that the Father continued still in possession, and acted still as absolute Fiar, and that the Registers of that Shire were carried out of the countrey, so that they neither could, nor were obliged to know the Sons Infeftment. And that, albeit it was alledged for the Son, that as fraud never ought to be presumed, so there is no ground for presuming it here, since this Infeftment ought to be imputed to another cause, than a design to defraud Creditors, *viz.* to a prior Contract of Marriage; wherein his Father having gotten a great portion with his Mother, was therefore obliged to Infeft him in his Lands, and this being the ordinary way taken to secure antient Families against prodigal Sons: And it being the ordinary remedy taken by provident men, when they give great portions with their Daughters; It were very dangerous to reduce such Dispositions at the instance of posterior Creditors; in whose favours nothing was provided, by the Act of Parliament, and the Sons Infeftment being registrat did likewise take off all presumption of Fraud. And though the Registers were taken away, that could not prejudice the Defender, or be a ground of Reduction here, no more, than it could defend him against a Reduction *ex capite inhibitionis*, or *interdictionis* for the user doing *omne quod in se est*, & following the faith of publick Registers, cannot be prejudged by an accident, to which he had no accession. And there was as good reason for reducing interdictions at the instance of posterior Creditors, as for reducing such base Infeftments: the not allowing of which would still force Sons thereafter to be at the great expence and trouble of publick Infeftments, and even these publick Infeftments, were lyable to the same reason of Reduction, since lawful Creditors were in both cases prejudged; and a Son preferred to them. And though equity should be considered, where there is no Law; yet where there is an expresse statute, in which many cases are considered, *casus omiffus, habetur pro Omisso*. It was here observable, that the Contract of Marriage did not bind the Father to Infeft the Son in these Lands, but that hereby the Estate was only provided to the Heirs of Marriage, so that the Son behoved to have been served Heir, and so would have been lyable to the Fathers Debt, if this new Infeftment which was here quarrelled, had not interveened.

Not only deeds done to the prejudice of prior Creditors are reduceable, but even deeds done *dolese* to the prejudice of such as became Creditors, at the same time with the deed done, are reduceable. As for instance, one brother grants a Bond to another, upon designe to let the friends of her whom he is suiting in Marriage, see that he has an Estate, and immediatly after the Contract or about that sametime, grants a Discharge to his Brother, having engaged the Womans Friends to give him a great Tocher in contemplation

of that fallacious Bond: this Discharge is reduceable, as given fraudulently to the prejudice of the Woman who gave the Tocher. And who is Creditrix by that Contract, without respect to priority or posteriority of the Debt. As was found in the case *Henderfon* against *Henderfon*; and *Donald Foller* being provided by his Father, in his Contract of Marriage; to the Conjunct-fee with his Wife, of a Tenement of Land, the Fee whereof was provided to the Children of the Marriage, and the Father having fraudulently taken a Tack from the Son at the same time; the Lords reduced the said Tack, as done on defraud of the said Contract, & *contra fidem tabularum nuptialium*. As if this had been otherwise decided, all poor women might easily be cheated, and contracts of Marriage, which are the Obligations most privileged by Law, would become ineffectual and might easily be evacuated: And so favourable are such Obligations in Contracts of Marriage: that *Cleuncarse* having provided his Sons by several Bonds of Provision, and having thereafter dispon'd his Estate to his Son in his Contract of Marriage, the Son having got a good Tocher in contemplation of this Estate; the Lords did find, that the Sons Fee could not be reduceable by, nor affected with those Provisions, since they were but latent Rights, which neither the Son, nor they who contracted with him were obliged to know.

The presumptions from which Lawyers conclude a designe of cheating future Creditors, are those. 1. if the Debitor dispoise all his Estate, *assignatio omnium bonorum*, especially if he reserve not his own Liferent, as in *Masons* case, for it is presumed, that no man would denude himself of all means of subsistence without some malicious designe, and if the Disposition be made without an onerous Cause, *l. omnes §. Lucius ff. de his qua in fraud*: or for a lesse price, than the thing dispon'd was truly worth, *Strach quart. de decoct. part 3. num. 27.* but since *licet contrahentibus in emptione vel venditione se in vicem decipere*, it seems that this extension should not hold, except where the thing disposed is much under-rated. 2. If the Disposer be Bankrupt, or a Cheat, or *deplorata vita*. *Strach num. 23.* 3. If he borrowed immediatly after the Disposition. 4. If he borrowed secretly, and desired to conceal his condition, as in *Masons* case. And 14. Decemb. 1661. *Duff. contra Culladdin* this qualification of fraud, was sustained to reduce a Right made by one Brother to another, *viz.* That the Brother in whose favours the Right was granted, desired the Resignation and Infeftment thereupon should be kept secret, and thereafter suffered his Brother to continue in possession. 5. If he borrowed sums far above his fortune: and upon this last presumption, a Merchant in *Paris* was executed, having borrowed vast sums, with which he broke next morning after they were borrowed.

## To any Conjunct or Confident Person.

THE reason why the Act suspects such, and is more unfavourable in the case of Dispositions, and Rights made to Conjunct or Confident Persons; is, because these have easier occasions of making, and are more prone to make such Rights than any else. For what strangers would cheat Creditors for one another? and though a Debitor will be desirous to prefer his Creditors to strangers; yet he will be ready to prefer his Friends to his Creditors. Which reason seems to be insinuat by that excellent Law, *l. 27. C. de donat. Data jam pridem lege constitutum, ut donationes interveniente actorum testificatione consiciantur, quod vel maxime inter necessarias, conjunctasq;* per-



*personas convenit custodiri; si quidem clandestinis ac domesticis fraudibus, facile quidvis pronegotii opportunitate confingi potest, vel id quod vere gestum est aboleri.* And the Doctors have received as a brocard, that *conjunctus presumitur, scire facta conjuncti* Lo. lavi. 1. ff. unde cognati: & therefore *presumitur alienatio in fraudem facta, quando facta est donatio omnium bonorum vel conjuncte persona*, Bart. ad l. post contractum ff. de donat. num. 23. Our Laws has not fully determined who are repute conjunct persons, since this opens a door to arbitrariness in Judges; it had been fit the Law had obviated by a special definition, quoad this poynt the Power of Judges, as well as the fraudulent conveyances of Creditors. But certainly Father & Son, & all degrees ascendent and descendent, are repute conjunct, And because these are the most near Relations, therefore Dispositions made to them, are not only reduceable by this Statute; but such Dispositions, when made to such as might have been Heirs, make the receiver, successor *titulo lucrativo post contractum Debitum*, Which passive title was not extended against a Brother, though the Disposer was so old that he could not expect Succession whereby his Brother might be excluded, nor was the presumption of fraud so strong amongst collateralls. as to infer so odious a passive Title, but reserved Action upon this Act, 1621. in swa far as the cause was not onerous, 17. D. scumb. 1672. *Spencer-field contra Kilbrakmont.* 2. Brother and Brother are repute conjunct Persons. And Uncle and Nevy as was found 13. January 1678. *Kinloch of Gourdie contra Blair.* And Aunt and Neice 15. July 1675. *Alexander contra Lundie*; but whether this should be extended to Cousin Germans is more debateable, for there is no decision betwixt so remote Relations, and it were hard to oblige such Relations, to prove an onerous Cause otherwise than by the narrative. And the Annulling of a Right unless the onerous Cause be proven, being a part of this Law, which is both Penal and Correctorie, it were hard to extend it; but yet on the other hand Cousin Germans are reputed so far Conjunct Persons in other cases that they cannot be Witneses for one another. 2. The Act of Parliament speaks of defrauding Creditors in favours of Children, Kinsmen and Allays, nor can it be denied but Cousin Germans are esteemed conjuncts by the common Law. 3. The danger of annulling such Deeds and Rights being easily obviated by keeping up the Documents whereby the onerous Cause can be proven it is much more just and convenient that so near Relations should be put to this trouble, than that strangers should be exposed to be defrauded by contrivances amongst those who are so nearly related. But whether this should be extended to the same degrees in affinity, as in consanguinity, has often been contraverted; and it is certain, that in other Statutes, *non idem est jus afinitatis, ac consanguinitatis*, And thus the Statute forbidding Father, Son, or Brother, to Judge in Actions of their *correlati*, is not extended so as to prohibit Fathers, Brothers or Sons in Law, to Judge in such cases; as was found in *Mores* case against *Grubbit*. But yet a Sister in Law was found to be a Conjunct Person, 5. July 1673. *Hoom contra Smith*. And a Brother in Law was repute a conjunct Person in the Reduction against *Major Biggar* at *Wanghays* instance. And *Sneidwin hoc tit. pag. 1209.* tells us, *that inter affines & conjunctas personas fraudes presumuntur*. And since men will do as much for their Allies, as for their blood Friends, especially for Sisters, or Brothers in Law; and that the Law upon that same reason repells them from being witneses: It seems most reasonable that they should be repute conjunct Persons. And it is not imaginable why the Law, which is jealous that an Allye or *Affinis* may perjure themselves for another, should not be much rather unwilling to assist them in such conveyances as these to the prejudice of their Creditors, where the Cheat is easier, and less dangerous.

But whether a Bastard be such a conjunct Person, as that a Disposition

made to him by his Father is Reduceable; may be doubted: for upon the one part, a Bastard *patrem demonstrare nequit*, and he who is of no blood, cannot be conjunct upon the account of Blood: And yet upon the other part, a Bastard is known to have much natural affection, and so may be presumed a person willing to convey such frauds: and upon this accompt, the Law rejects him from being Witness in Favours of his natural Father, *Marfil. singul. 273* And a Bastard with us is only received *cum nota*. And the Law hath allowed him action against his Father for Aliment. And though the Law will allow him no advantage by his birth; yet it should not capacitate him to cheat others: And I think this distinction more reasonable than to say with *Paleot*: that Bastards are not conjunct upon the Father side, but on the Mother side. *cap. 60. de nothis*, or to say with *Alex. consil. 60.* that these are to be accounted Conjunct, in so far as concerns marriage only, so that a Bastard Brother cannot marry his Bastard Sister; for certainly, though these be not conjunct in strict Law, *sunt conjunctis similes. Felin. ad cap. per tuas de probat.*

Who is understood to be a confident, seems more difficult, and it would seem that an ordinary Factor, or a Domestick Servant must be said to be confident Persons, and an ordinary Agent was found to be such a confident Person, 26. June 1672. *Moubra* against *Spence*, and *Immola ad b. t. leg. post contractum* affirms that *amicus, magna amicitia conjunctus*, is lyable to this presumption, and the Law judges still of him as of *conjunctus sanguine*, and friendship is oftimes warmer than blood.

Dispositions likewise *omnium bonorum*, are reduceable; though not made to confident Persons, but to a meer stranger: except the Disposition be made for an onerous Cause, for the Law presumes as I observed formerly, that it is made to prejudice Creditors; and it were unreasonable that a meer gift should be preferred to poor Creditors, this was found the 18. November 1669. *Henderson contra Anderson*. Albeit it was there alledged, that this Act declares such deeds only reduceable, as are made in favours of conjunct and confident Persons, for though this Statute make that a Presumption of Fraud yet it excludes not other presumptions, such as were in this case, *viz.* that it was *assignatio omnium bonorum*, and that it bears to be granted for a cause falsely narrated, *viz.* for the sum of two thousand merks, wherein *Anderson* was Cautioner for *Howat* the common Debitor; whereas it was offered to be proven by Discharges granted by the Creditor to *Howat* himself, that the far greatest part of this sum was payed before the Disposition.

Since this clause of the Statute annuls deeds only done to confident or conjunct persons, it would seem, that such Rights when made to others who are not conjunct, nor confident, are not reduceable, and yet *de Praxi*, all Rights made to any Persons whatsoever, without an onerous or necessary Cause, are reduceable by this Statute, and our Law considers the difference betwixt conjunct, or confident Persons, and others; only in reference to the way of Probation, so that these must prove an onerous cause whereas others need not; This shews how mysteriously our Statutes are conceived.

### *Without true just and necessary Causes, &c,*

**T***itulus onerosus*, is when any thing is dispon'd with the burden of doing or paying somewhat; *titulus lucrativus*, is when the deed is meerly gratuitous, and proceeds from meer favour.

The Civil Law observed two Rules, in the difference betwixt an onerous and

and lucrative cause, *quoad* this Action. The first was, that this Action was competent, even against these who had received such Rights for onerous Causes, when both the giver and receiver were guilty of Fraud, if they were partakers of the Fraud, *l. ait. praetor ff. h. i.* And in that case the thing alienated was recalled without restoring the price. The second Rule was, that he who had received such a Right, *ex causa lucrativa*, was lyable to restore, though he was not accessory to the fraudulent conveyance. *l. quod autem § ij. ff. eod.*

Our Law likewise considers two cases, one is, if the Creditor had done no diligence; and then Rights made to their prejudice are only reduceable, if they be made to confident persons without an onerous Cause: The other if the Reducer has as a Creditor done diligence, and then the Rights done to his prejudice are reduceable, whether they be made *ex titulo oneroso*, or *lucrativo*. For by the last part of the Act, it is declared that the Debitor cannot prefer one Creditor to another, to the prejudice of any such diligences.

How far children are Creditors to their Father, and may upon this Statute reduce deeds done by their Father in favours of other Children after their Provisions, may be dubious in many cases, of which I shall only name a very few. The first is, a Father by his Contract of Marriage with the first Wife, provides the Children of the first Marriage to ten thousand Pounds and by the Contract with the second Wife provides them to twenty thousand Merks, and by a Contract with a third Wife provides the Children of that Marriage to ten thousand Merks. The question rises, whether the Children of the first Marriage can reduce the Contract of the second Marriage, *quoad* the Provisions therein made: as made in prejudice of them who became lawful Creditors by the first Contract; or if the Children of the second Marriage, may not do the same to the Children of the third Marriage: and I conceive that if the Provisions be made to the Heirs of the Marriage, and if they enter Heirs, they cannot reduce, because *tenentur prestare*. But if the Contract bear Children of the Marriage, some think that they may assign their Portions, and the assignay may reduce these Provisions made in the second Marriage. And just so the Children of the second Marriage, may reduce the Provisions made to the Children of the third Marriage: But I think, that either the Children of the first Marriage are Intest, and then certainly, the Father cannot prejudice them by posterior personal Provisions, or else where neither are Intest, I conceive, that if there be an onerous Cause, such as a Tocher payed by the Contracts of the second, or third Marriages, and then also the Contracts cannot be reduced upon this Statute: For these Contracts are not made to defraud Creditors, since they are made for an onerous Cause. Yea though there be no Tocher, yet even the Marriage is an onerous Cause; for who would marry if there were no Provision, and the designe here, was not to prejudice true Creditors.

The other Case is, a man in his first Contract provides his Land, and ten thousand Merks to the Heir of the first Marriage, and in the contract with his second Wife, he provides the Children of that Marriage, to the conquest that shall be made during that Marriage. The question is, whether the Son of the first Marriage will be Creditor to the Father for ten thousand Merks, even though he be served Heir to his Father: For though here it seems, that *confusione tollitur obligatio*, the Son of the first Marriage being both Debitor and Creditor Yet conquest is still understood to be, *illud quod superest deducto are alieno*: and therefore the Children of the second Marriage, can have no Right but with the burden of these ten Thousand Merks. And in the case of *Scot of Baivila contra Binning*; The Lords found that the Heir might reduce the Provisions made to the Wife, and Bairns, of the second Marriage, in so far as



concerned, the ten thousand Merks provided to the Heir of the first Marriage: but this may be doubted; for first it may be alledged that there was no Debt, since the Pursuer was the Debitor himself. But secondly if the money with which the Land was bought, was conquest also in the second Wifes time, it seems against Law and Reason, that this should not be called conquest *quoad* an Heir of another Marriage, *cui nihil deest*, though if the money had been conquest in the first Marriage, it might be more properly called *Æs alienum*.

A third case is this, a Father obliged himself in his Contract of Marriage with his first Wife, to provide the Bairns of the Marriage, to eight thousand Pounds: but before his death he provides one of the three Bairns to the whole eight. The question proponed was, whether the other two Daughters might raise a Reduction of the Disposition made to their Sister upon this Act. And for these Sisters it might be urged, that the Father became Debitor to them *pro rata*, even as if he had granted Bond to six men for a sum, each of them would have had Right to a proportional part of it; at least, that each Child became Creditor to him, and so something was due to each of them. And consequently he defrauded them by his disposing all to any one: but for the other sister, to whom the Disposition was made, it might be alledged that the Father was Debitor only to the Bairns of that Marriage, *tanquam stirpi*. and so he satisfied his Obligation by disposing his Lands worth that sum to any one of them, but was not Debitor unto them in *capita*. 2. The designe of the parties Contracters, in such cases, is only to secure the sum to the Issue of that Marriage, without consideration of any Division; for this Provision is made to secure against Children of other Marriages; but not to secure one Child against another, and there may be some reason to be jealous of the Father in the one case, but not in the other. 3. This restriction were contrair to the Fathers *patria potestas*, and the Law is never jealous of the Fathers affection, but presumes that his division will be just, and what Judge should be juster to Children than a Father. 4. It were against the interest of the Commonwealth to restrain, or take away the Fathers power, of Distribution in such cases, which is the great curb, that the Father has upon his Children, for making them good Children, or good Citizens, and were it not against reason, that if the two sisters had been very Vicious, and the third most Virtuous, that the Father should have been so bound up, that he could not gratifie the one, or that he behoved to provide the other with Money to serve their lusts. 5. It is ordinar to provide expressly, that the Money so provided to the Children should be divided as the Father pleased, and the Law uses to decide general cases according to what is ordinarily pactioned; presuming that to be the *tacit* will of the parties, which is ordinarily the expresse will of other parties. Likeas if it had been contraverted amongst the parties at the time when the Contract was to be subscribed, who should have had the Power of division? certainly, it had been allowed to the Father. To which last I incline, except it could be alledged that all were equally deserving, and that the Father, or Children preferred, had used indirect means in preferring one to the rest. For though there be no *quærela testamenti inofficiosi* with us, yet there may be some place perhaps, for the Judge to interpolate in such cases. I find by the opinion of the Doctors, a Father disposing to one Child a necessary Portion, is not said to defraud the rest of the Children, to whom he disposed formerly, *nam hoc, potius tribuendum pietati quam fraudi*. And it is clear, that for this reason *Libertus in fraudem patroni, filia dotem constituere poterat, l. 1. §. sed si 10. ff. si quid in fraud. patro.* but is not so with us in all case, it has been formerly observed.



and so is the legal *quota*. And because Rights made by a man upon Death-bed, to the prejudice of his Heir, is restricted to a Tierce; but if the Contract bear, the Land to be disposed to the Son in Law for Love and favour, that narrative proves *titulum iudicatum*, tho' really no other Tocher was bestowed; and tho' a Joynture was given, as was found betwixt *Graham* and *Stewart*.

How far a Wife is Creditrix by her Contract of Marriage, and may reduce Posterior deeds as done in defraud of it, is debateable in many cases, as to Heritage; but these fall not properly under this Act, but under the Act 105. Par. 7. Ja. 5. And as to the Husbands Moveables, I shall only mention one case, viz. *Campbel* contra *Campbel*, Decemb. 1674. which was this; *Campbel* by his Contract of Marriage, provided his Wife to the half of the Moveables, that should pertain to him at his Death, & a little before his Death, he disposed many of his Moveables to his Brother; whereupon the Relict raises a Reduction of that Disposition upon this Statute. To which reason of Reduction, it was answered, that the reason was not relevant for the Relict was only Creditrix by this Contract, as to what Moveables should belong to the Husband at his Death, which was but *κληρονομία κατ'εξουσίαν*, & *spes successionis*, but did not hinder the Brother to Dispose at any time, in his *liege poussie*, upon any part of his Moveables. And as such Clauses providing a Wife to the third of the Moveables, were most ordinary, so if this were sustained, the Husband could not gift to his Brother, or Relations, any Horse, or any thing else. To which it was replied, that if such Dispositions were sustained, the former, or the like Clauses would be Elusory, and might easily be evacuated; for a Husband might Dispose a little before his Death all his Moveables: this was not decided. But the Lords inclined only to sustain this Disposition, if made for some probable Cause: but if it had been made upon Death-bed, it was Reducible, or if there had been great presumptions of fraud adduced to clear, that it was contrived as a meer cheat against the Relict. But were clear, that if the Donation, was only of one particular thing, made in *liege poussie*, it could not be quarrelled upon this Act. It may be doubted, if when the onerous Cause, exprest, is not true, or if there be no onerous Cause, but that the Right granted bear expressly to be for love and favour: if in either of these cases it be not lawful to the granter to astrict his Disposition, when quarrelled upon this statute, by offering to prove, true and real onerous Causes, prior to the Debts whereupon the Reduction is founded. And first, it is without all doubt, that if the Right bear no Cause, the user may condescend upon, and offer to prove the true and onerous Cause. 2. I find it decided, that where the writ did bear only love, and favour, tho' granted by a man to his own Wife; she was allowed to astrict it, by founding it upon her Contract of Marriage, and ascribing it to make up the defects of the Lands, provided to her by her said Contract. January 1669. La. *Brac*, contra *Chisholm*. 3. Where the Disposition did bear love and favour, and other onerous Causes: The receiver of the Disposition was admitted to astrict the Disposition, by proving an onerous Cause adequate to the worth of the Land. In the case *Naper* contra *Ardmore*: which Decision may be debated, for why was love and favour insert, if the Cause was adequate, and this was a great presumption of the fraud, especially in a Disposition by the Father to the Son, for tho', *utile per inutile non vitiatur*. And that this might have proceeded *ex stilo*, yet in suspect cases, where it is known that narratives are much considered, these Arguments are but weak. 4. Where the Writ bears an onerous Cause, and that the Cause can only not to be proven. Then it seems reasonable that the person to whom it was granted, may astrict his Right, by offering to prove that there was other sums justly resting to him. 5. If the Disposition bear an onerous Cause; but if it be proven expressly, that the Cause exprest is not true, but is calumniously, and fictitiously exprest; I would conclude, that the user should not be allowed to astrict  
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another true Cause, and that in *in odium falsi & calumnie* : even as if the date of an execution, or other diligence, be found to be false ; the user is not allowed to altrust the same, by condescending upon another true date, and abiding at it.

### Without true

**T**He Doctors also condescend upon a third kind of Title, different from both a lucrative, and an onerous Title ; and this they call a mixt Title, *titulum mixtum*, l. *apud Celsum §. authoris ff. de except. doli. vid. Jason ad l. nemo potest ff. legat* : and an instance of this given in an Alienation made in defraud of Creditors, for lesse than the true price. And even in this case, Reduction is competent for the Creditor prejudged, in so far as the price received is below the true value: and thus l. 7. *Basil. h. t. si quis emptorem daretur in alio loco per alium, et tunc per alium, et tunc per alium, si in fraudem Creditorum meorum, minore pretii fundum vendidero, revocatur quod gestum est, etiam non reddito pretio*, but since *licet contrahentibus in emptione & venditione se invicem decipere*. and that we see prices of Land very different, every man taking his advantage. It may seem strange, why the Law should pre-judge so far the Buyer in this case : and I conceive, that except the price be palpably made so low, upon design to cheat Creditors, (any of the Creditors having offered more) or that it is extraordinary low in it self ; such prices cannot be challenged. As if a chaldre of Victual, worth truly 3000 Merks, were sold for 2000 Merks : But yet I think not that it behoved to be *ultra dimidium*, below the just half ; for then it might have been reduced by the Civil Law upon another head, and so this Action had been unnecessary.

Whether if any Debitor buy a hazard (*jañum retis*, as Lawyers call it) v. g. if he buy a womans Life-rent at seven years purchas, and dispoñe his Land for the price : if she die the next year, may not I reduce that Disposition, as done to the prejudice of me a lawfull Creditor ; even as a Minor might reduce such a bargain, if made by his Tutors. To which I conceive it may be answered, that it cannot be quarrel'd, if it was made in the ordinary way, and for the ordinary advantage, for which a man would have transacted it, if he had no Creditors, and if no design to defraud, can be shown : and here that maximè holds, *fraus, & eventum & consilium requirit* : nor are the Leidges put in *mala fide* to Contract with Debtors in such cases.

### Without just.

**I**T is not sufficient, that the price or cause be onerous, but it must be just ; that is to say, a price which the Law allows ; as for instance, if a man should loose a great sum at Game, and for payment of it, should dispoñe his Lands, that Disposition might be quarrel'd as made without a just price, because the Law allows not the payment of what is gained at Game, if it exceed 100. Merks Scots. And since the Law would not sustain Action for it, at the Gainers instance against the Debitor who loosed it, much lesse should it sustain a Disposition for payment of it against the Creditors, and yet this may be said to be an onerous Cause ; for the looser hazarded as much of his own, against what he gained. and so this Game was but the return of his Money : and like to *emptio jañus retis*. And though it may be alledged, that by the

14. Act. 23. Pa. *Ja.* 6. The surplus of what is gained at Game above 100. marks is ordained to be consigned for the poor of the Parish. And so the Disposition made for payment of it, must accrete to them; and is still an onerous and necessary Debt, *quoad* the loser, and consequently is not reduceable at the instance of his Creditors; yet I conceive that such a Disposition would be reduceable at their instance, as not made for a just Cause, since it is made for a Cause, upon which the Law would not allow Action. And the Civilians number, what is gained at Game, amongst lucrative Causes. *Bald. ad l. i. C. si. quid in fraud: Patron.* And generally what is acquired unlawfully, is by them said to be acquired, *titulo lucrativo*, *Jason hic num. 8.* & thus Dispositions granted *ob turpem causam*, &c. may be said to be reduceable also upon this Statute, as granted without a just and onerous Cause: according to them; as is granted without a just Cause, to speak in the terms of this Act. And I think, we speak more properly than the Civilians here, for what is gained at Game, rather wants a just Cause than an onerous Cause.

### *And necessary Causes.*

**D**ispositions made to conjunct or confident Persons may be quarrelled, tho' they be made for a just and onerous Cause; if they be not made for a necessary Cause. For it may be fraudulent, and be designed to prejudice Creditors, except the Cause be necessary, tho' it be onerous. As for instance, if a conjunct, or confident person, knowing that his Debtor intends to frustrate his Creditors, and to go out of the Countrey, and yet presuming that a Right granted for an onerous Cause cannot be quarrelled, should so far comply with his fraudulent design, as to buy Land from him, and to pay him the price upon that design, such a transaction may appear to be fraudulent, and lyable to be questioned upon this Act; and these words of it, *without true just and necessary Causes.* I find also that the Laird of *Tarfappay* having dispon'd his Estate to the Laird of *Kinfauns* his Nephew, there was a Reduction of the said Disposition raised upon this Act of Parliament, as being made by a Bankrupt to his Nephew without an onerous, at least a necessary Cause, in so far as tho' the Disposition was made to *Kinfauns* the Nephew for payment of several Creditors to whom *Kinfauns* had engaged himself; yet there was no necessity upon *Kinfauns* to have engaged himself to those Creditors, and so his interposing for these Creditors unnecessarily who had done no diligence, could not prefer them to other Creditors who had done diligence. To which it was answered, that *Kinfauns* the Nephew finding no diligences done at the instance of the Creditor he was *in bona fide* to take a Disposition to his Uncles Lands with the burden of Debts owing to other Creditors equivalent to the value of the Lands; so that tho' the Disposition was made to him as a conjunct person, yet it was not without an onerous Cause. And as to the Reason of Reduction that *Tarfappay* was Bankrupt, because there were many Hornings against him. It was answered, the Act of Parliament determines not what is a Bankrupt, but annuls only deeds done without an onerous Cause; and deeds done in prejudice of Creditors who have done diligence, neither of which can be alleged in this case: And tho' if there had been Horning or Diligence raised at the instance of any Creditors, *Kinfauns* could not have taken a Disposition for payment of other Creditors, except he had been bound for these other Creditors prior to these diligences, yet in this case where there was no diligence, it was lawful to him to take the said Disposition, since this Creditor had

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used no Diligence, and no buyer was ever obliged to look the Registers of Hornings. The Lords upon this debate reduced the Disposition, because there were many Diligences raised against *Tarfappy*, tho' this Creditor had used none, and that *Tarfappy* was in the Abbey when he made this Disposition 18. Decem. 1673. But it still remains as a doubt whether as a person may receive a Disposition notwithstanding of an Inhibition of the Debitor inhibited was specifickly obliged to grant that Disposition prior to the Inhibition, so may not a conjunct person accept a Disposition from a Bankrupt, for implement of Obligations in vvhich the granter vvas obliged prior to any diligence raised by other Creditors, since that Obligation may be justly said to be granted for a necessary Cause, and not preferring fraudulently one Creditor to another.

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*To have been from the beginning ; and to be in all time coming, null, and of none availe, force, strength, or effect ; by way of Action, Exception, or Reply, without any further Declarator.*

**B**Y this Paragraph of the Statute, the nullity arising from this Statute, is receiveable by way of exception, as well as action, *ope exceptionis*, as our Practick terms it : and this was introduced in favours of the Pursuer, who is leised by the fraud, whose advantage it is to have his interest sustained to him any way, and so to have his diligence thus shortned.

For the clearer understanding of these words, we must consider, that by the common Law, nullities are either such as are received *ipso jure*, or *ope exceptionis*. That is said to be null, *ipso jure* where the thing is declared null by any expresse Law, as this is by this Statute, *quod contra legem fit, pro infecto habetur, & ipso jure nullum est. l. non dubium C. de legib :* that was *nullum ope exceptionis*, which was not receiveable, except the nullity had been proposed, by him to whom it was competent. But in our Law *nullum ipso jure & nullum ope exceptionis*, are the same, & *termini convertibiles*. and with us the opposition is betwixt *nullum ope exceptionis, & actionis* ; the reason of which difference proceeds from the favour designed by the Law, *quoad* the form of procedure. For if any thing be null by way of exception, it is received summarly against the pursuite, without raising an Action of Reduction, or Declarator : but what is only null by way of Action, needs Process of Reduction, or Declarator. By the common Law, either a Penalty was not adjected to the prohibitory Law, but the thing was simpliciter prohibited, and these things were *ipso jure* null. But if the Law proceeded further, and adjected a Penalty ; then either the Penalty was adjected to the annulling of the deed : and then the deed whereby the Law was contravened was null, and the Penalty was also due, or else the deed was declared null, but so that it was some way allowed to subsist, but a remedy was appointed, and then it was not null *ipso jure*, but was reduceable by the way appointed ; according to the principles of the common Law, this nullity was receiveable *ipso jure*, for *quod contra legem fit, id ipso jure nullum est*. But so it is that this alienati-



on in defraud of Creditors, was declared null by the Law, and by this Statute being declared null, that nullity should be receivable *ope exceptionis*. and yet by our Practice the nullity arising from this Act, is oftentimes received only by way of Reduction, whereby the Lords have receded from the expresse words of the Law; and the only reason I can give for it, is, that the Author or Disposer must be called to maintain his Right; which could not be if the nullity were receivable *ope exceptionis*: and if the Disposer were called, he might eleid the pursuite, by alledging that the Debt, to the prejudice of which his Right was said to be granted, was payed, or discharged, or became extinct by compensation; neither of which could be known to the receiver. And yet I find in some cases, this nullity receivable, *ope exceptionis*, v. g. If the Right bear, to be for love and favour; for here there needs no Probation that it is fraudulent, and it is a principle, that where the nullity is founded upon Law, and the subsumption is instantly verified, that *eo casu* the nullity is receivable *ope exceptionis*. And in my humble Opinion, wherever the Fraud can be instantly verified, it ought to be received *ope exceptionis*, the former and ordinary reason, viz. That the Disposer should be called, because he may alledge the Debt to be payed, seems not to be good, because that nullity is not competent to be propon'd by way of exception, but where there is a competition betwixt the Creditor, and confident persons, both pretending right to the Lands and others Disposed, which cannot be but where the Creditor has comprised; and tho' before comprising, the Creditor ought to cite the Disposer in his Reduction, which is *processus executivus*, and previous to, and in order to execution by comprying: yet after ultimat execution by comprying, it is not necessary the Debtor should be cited upon that pretence, that he may question the Debt as satisfied. 2. I find that Dispositions of Moveables, have been found null by way of Exception, tho' Heretable Rights are not found null without Reduction or Declarator, and thus it was decided. 16. June, 1671. *Bower contra the Lady Compar*: The reason of which distinction must proceed from this, viz. that *mobilium vilis est possessio*, *vicia aequa* as the Greek calls it, and therefore the Law requires not so much solemnity to their constitution, nor destitution, or revocation. 3. I find, that where the Right quarrelled, is *parvi momenti*, the Lords admit the nullity to be receivable, *ope exceptionis*, 5. January, 1669. But here the parties were poor, which I find they do also in nullities *ex capite inhibitionis* &c. in small matters, and betwixt poor parties, *nam de minimis non curat lex, & de minimis summarie jus dicit prator*. Since there the subject matter is not able to bear large expences. 4. I have observed, that where the nullities did arise *incidenter* from another pursuit, depending, that there it was received, *ope exceptionis*, least the other Process should sist, as was found in the case *Haliburton contra Morison*. Where a Reduction being intended, at *Haliburtons* instance, of *Morisons* Right, *ex capite inhibitionis*, it was alledged that *Morisons* Disposition depended upon a Right prior to the Inhibition. To which it was replied, that that Right was null by the Act, 1621. Upon vvhich debate the Lords sustained the quarrelling of this Right, by way of reply. But I should rather think, that where the Right is betwixt most confident persons, such as Father and Son, that *eo casu* the nullity should be receivable by vvay of exception, both because the Cheat is easiest, and most unfavorable: and because the Father, or very near Friend might have made all concur vvillingly to defend the Right, vvithout the necessity of being called, vvhich is the reason vvhy Reductions are so necessary in other cases.

And

And in case any of His Majesties good Subjects (no wayes partakers of the Fraud) have lawfully purchast any of the Bankrupts Lands, for a just and competent Price, &c.

IT is much debated amongst the Doctors, if *Actio Pauliana* be *Actio realis* or not. The Gloss and some Interpreters assert it to be only a personal Action: And they conclude so, because the Possessor of what is alienated in defraud of Creditors, is not lyable to this Action, except he be *particeps fraudis*, or else have acquired the thing so alienated without any onerous Cause, that it is not the possession, but the deed of the possessor that is considered. Our Law agrees in this with the Civil Law, for by this Paragraph it is statute, that all who have acquired the thing alienated in defraud of Creditors, shall not be lyable to this Reduction, but such only as are partakers of the fraud, and have not payed a just price to the interposed Person. As for instance, one disposes his Estate to his other Brother, or Brother in Law, without any onerous Cause, which Brother Disposes it again to a Stranger who knew nothing of the Fraud or Relation; and who pays a just and adequat price for it. In which case, a prior lawful Creditor may reduce the first alienation made to the Brother, but he cannot reduce that Alienation that is made by the Brother to the Stranger: And yet if that Stranger did either know the Relation, or that the first conveyance was fraudulent (which the Act calls the being partaker of the Fraud) or if he payed not an adequat price, then and in either of these cases, the Creditor may reduce even the Disposition made to the stranger. He is said to be partaker of the Fraud, to whom it was intimate by the Creditor, that he should not buy, *l. ait prætor ff. hoc tit.* which is founded upon excellent Reasons, and would certainly hold in our Law; tho' I remember not that it is already so decided. For this intimation would take away the *bona fides*, upon which the priviledge granted by this Act to singular successors is founded.

But the third parties knowledge, that it was to the behove of the Bankrupt or of the confident, is still sufficient to take from him the benefit of this Clause; which being granted, because of the third parties *bona fides*, cannot reach to such, whose knowledge put them in *mala fide*, as was found 22. June 1669. *Hamilton contra Hamilton*, and the *Viscount of Frensdright*.

As also, if the Disposition made to the first receiver, whom this Act calls the interposed Person, did bear love and favour, and was made to a confident Person; in that case, the Right is reduceable. For in that case, the third Person buying, ought to have known the nullity, & *scire*, & *scire debere æquiparantur*: And this was found in the Reduction of a Tack, 6. February 1672, *Hay contra Jamison*. Though that Tack had past thorow many hands, and to singular Successors, who had acquired their Rights for onerous Causes. As also, if the Right disposed to the third Partie, did bear the Relation, or if he knew it, he who acquires the Right is obliged to Instruct the onerous Cause, and so should get up the Instructions of it for his own Security, which, the Lords found, he is obliged to produce for proving thereof 24. January 1688. *Crawford contra Ker* 5. for though it may be

contended, that the Third Party cannot be said to be *particeps fraudis*, in this case, yet this Clause secures not such as acquire from conjunct persons, where they are not *particeps fraudis*, but secures only Acquirers from confident persons, who are not *particeps fraudis*, & the Reason of the difference is, because the Acquirer cannot know one to be a confident, except he himself be *particeps fraudis*, but he may know one to be a Relation without being *particeps fraudis*, and so it was necessary to oblige such to prove the onerous Cause in the first Right, betwixt those Relations, since they knew the danger. And if this were not requisite the Relation and conjunct Person might make over his Right securely to a third Party, which would disappoint altogether this Remedy introduced in favours of the Creditors.

I have heard it debated, that though a third Person, who acquires a Right from the Person interposed, for an onerous Cause, be not lyable to this Action; yet a compyryer, compyryng this Right from the interposed Person, had no such priviledge. As for instance, a Right made by one Brother to another without an onerous Cause, is reduceable, and therefore if one of the Creditors of that Brother, to whom the Right was made, should compyrye the Right so made to him: It was alledged, that as this Right would have been reduceable, in the Person of the first Acquirer, if it had continued with him; so it would have been reduceable from the Compyryer; and that for these Reasons, 1. A Compyryer comprises only, *omne jus quod in debitore erat, tantum, & tale*: and therefore since it was reduceable in his Debtors Person, it ought to be so in his, even as it had been reduceable from his Creditor, *ex capite Inhibitionis, aut interdictionis*, &c. 2. The express words of the priviledge, given by this Paragraph, does not meet this case, for the words run thus; *if any of His Majesties good Subjects, shall by lawful bargains purchase*. But so it is, that he who compyryes, cannot be said to purchase by way of bargain; but though a compyryng be a legal Disposition, and Assignation, yet it is a sale by the Judge, and not a purchase, or Contract amongst the Parties. 3. This case seems not to fall under the reason of the Act; for the Act priviledges such, as having a good security, do in contemplation of that Right, (which for ought they can know, is sufficient) lay out their Money, & so follow the faith of that Right, in the first constitution of their Debt. But the Compyryer lent his Money to his Debtor, without shewing that he relyed, upon the Right now quarrelled, but finding thereafter that he could not recover his Debt, he compyryed any thing he could find. 4. If this were allowed, it would open a wide door to fraud; for Rights might be made to confident Persons, and then might be compyryed; which any Creditor might be induced to, whereas few would adventure to buy originally these Rights, as said is. This case was debated in July, 1666. betwixt Jack & Jack, but was not decided: and it did divide the opinions of very able Lawyers.

It may be doubted also, whether if the receiver of the Right from the interposed Person, knew not that the Right was fraudulent, the time of the alienation, but knew before he received the thing sold, that the first Alienation was fraudulent, this Right be reduceable, or not. And it seems that if he knew either at the time of the Vendition, or Tradition, that the Right was fraudulent, that he is *particeps fraudis*, and ought not to have the benefit of this exception: for *traditionibus, & non venditionibus, transferuntur verum dominia*, and so he cannot be said to purchase a Right *bona fide*, who knew before Tradition, the fault of the Right Disposed, and he might have kept the price in his own hand till Tradition, and so need not have been prejudged. Likewise, it is a principle in Law, that *bona fides requiritur in emptionibus; & tempore contractus, & tempore facta traditionis* l. 2. ff. pro empt. & l. 1. ff. pro solat.

Though



Though the Doctors give as a Rule that such Alienations are reduceable, as are made without an onerous Cause, and where the receiver is *particeps fraudis*: Yet they except two cases from this Rule, First, deeds done in prejudice of the Fisk, or of a City, or Incorporation, which they declare reduceable, tho' the receiver was not *particeps fraudis*. l. 2. C. de debitore Civitatis. But I think this most unreasonable; nor would it hold in our Law: for as the Act makes no Exception in favours of the Fisk, so in *dubio, semper contra factum respondendum*. And since this third Party is only privileged, because of his *bona fides*, I see not why he should be prejudged by the *mala fides* of his Author: or why he should loose his privilege where he can alledge his *bona fides*. The second Exception is in favours of a Patron, who might revoke the Goods sold, though the Buyer was not *particeps fraudis*. l. 1. ff. si quis in fraudem patro: but in that case he was lyable to pay the Price, *ibid.* we have no use for this in our Law. And yet by our Law, Masters have such a *tacita hypotheca*, in the Farms that grew upon their own Ground, that they may reduce any Disposition made thereof, even to a Buyer who was not *particeps fraudis*.

So favourable likewise are singular Successors, who are not *participes fraudis*, that a Tack being craved, to be reduced *ex capite fraudis*, as granted and delivered blank *quoad* the Issue or endurance, and in the Blank eighty one years being filled in: Whereas nineteen years were only communed upon; this was found relevant to reduce the Tack *quoad* the Tack-man, who had acquired Right to the Tack, but not *quoad* a singular Successor, for an onerous Cause, without being *particeps fraudis*. First Decemb. 1671. *Crichtoun contra rich-toun and Hannans*: and a Disposition being craved to be reduced, as granted by a person who was only a Trusty, having given a Back-band; the Disposition, though made as said is, to a singular Successor, was found to be reduceable, if the Right was made without an onerous cause; or that the singular Successor knew of the Disponers Back-bond; though it was but a personal Obligement, and not in *gremio juris*; and consequently could not in Law have otherwise affected a singular Successor. 20. Novemb. 1672. *George Workman contra John Craford*. And it has been often found in our Law, that though Gifts of Eichear, taken to defraud Creditors, be reduceable in the persons of such astook them; yet they are sustained, when establishd by Assignations in singular Successors, no ways partakers of the Fraud: And an Assigney is not obliged in Law to suffer his Cedent to swear in his prejudice, if his Assignation be made for an onerous Cause; but if either the Assignation be granted without an onerous Cause or be made upon design to preclude the Debtors from these just Remedies: then whatever is competent against the Cedent, is competent against the Assigney; so that we may establish this general Rule, *viz. participes fraudis*, have never the privileges competent to singular Successors.

If the Disposition has been made to the interposed person, for payment of a Price, but the Price is not equivalent to the thing sold, then in so far as the thing exceeds the Price, the Disposition will be reduced, but it will stand in *quantum*; even as a Disposition made to a conjunct person, will be valid in so far as it is onerous, for in neither of these cases is the Disposition absolutely revokable. But either the conjunct Person in the one case, or the singular Successor in the other, will be obliged to make up the true and just Price, as was found in the former case, *Henderson contra Anderson*, and the 17. January 1632. *Skeen contra Belfon*, which is likewise more fully clear by these words of the Act, *viz.* Providing always, that so much of the saids, Lands, Goods or Prices thereof, so trusted by Bankrupts to interposed persons, as hath been really payed, shall be allowed unto them, they making the rest  
E forth

forth-coming to the remanent Creditors: And the reason of this is, because the Law did not absolutely oppose the Alienation; but only did reprobate it, in so far as it was done to the prejudice of Creditors. And therefore, the Law resolving not to pursue its revenge, further than its Design, did reasonably ordain, that these Dispositions made in defraud of Creditors, should only be quarrelable, in so far as the Price was not equivalent, this likewise is fit for Commerce; which is never restrained in so far as is absolutely necessary: and this is very suitable to the Analogy of Law in other cases; for thus, according to the common Law, he who had taken an Obligation for more Annualrents than the Law allowed, did not thereby loose all his own Annualrents, but only loosed them in so far as they exceeded the *quota* prescribed by Law, *l. Placuit ff. de usuris*. And a donation bearing a greater Sum than the Law allowed, when the Donation was not insinuated or registrated, did not lose the whole, but only, *quatenus superat definitionem legis. l. sancimus C de donat.* And in our Law, though it be by express Statute appointed, that Tacks set by inferior beneficed Persons, without the consent of the Patron, for longer than three years, shall be null; yet *quoad* these three years they are still sustained, and are not annulled *in totum*. And albeit by another Statute, all Bonds and other Writs not subscribed by the Party, or two Notars for him, be declared null, if exceeding one hundred Pounds. Yet tho' granted for a greater Sum, it will be valid, if he to whom it was granted, restricted it to an hundred Pounds: And though Witnesses can prove nothing above an hundred Pounds; yet though the Sum craved be greater, the Pursuite will be sustained to be proven *pro ut de jure*, if restricted to an hundred Pounds. And yet I confess; that these Arguments from Analogy, do not in this absolutely hold, for in several of these instances, the Deeds specified *habent individuum formam*, prescribed to them by the Law, & *ubi actus est individuus, ratione Formae, ea non servata, actus omnino corrumpit, & utile per inutile vitatur*. But the Arguments taken from Donations, & *ab usuris* quadrat with this case, or at least the Argument *ab usuris* does.

*But the Receiver of the Price shall be bolden to make the same forth-coming to the Bankrupts true Creditors, for payment of their lawful Debts.*

**T**Hough the interposed Person be *particeps fraudis*, yet he is not by the Act, lyable to restore the Land, or others disposed to him simply, or the Price thereof, if he has disposed, the same to a Third Person: But there will be deduced, or allowed to him, so much either of the Land, or Price, as he has given, or payed to lawful Creditors: and the Superplus is to be forth-coming to the other Creditors, who wants their due payment; and that not without new Diligence, by these who have reduced the Right granted to the interposed Person, by Arrestment, or otherwise. But if the Creditor who has prevailed in the Reduction, had not done diligence to affect the Land, or Price, in the hands of the interposed Person, either by Comproyising, or Arrestment, he must notwithstanding the Decreet of Reduction, affect the same: Otherwise, other Creditors doing Diligence, will be preferable

ferable, being Reductions do not settle a Right upon the Creditors to their Debtors Estate, but they only sweep away such fraudulent Rights, as may stand in the way of their Diligence, and Execution; and hinder them thereby to get a Right to the Debtors Estate.

*And it shall be sufficient Probation of the fraud intended against the Creditors, if they, or either of them, shall be able to verifie by Writ, or Oath of the Party Receiver that the same was made without any true cause, &c.*

For clearing of these Words, it is fit to know, that the Word *Fraud*, is variously used by Lawyers; *Veteres, Fraudem pro Pœna ponere solebant. l. cum autem § 2. ff. de adilit. edictis.* It is taken *pro periculo alicujus incommodi. l. 1. ff. ad leg. falcid. pro noxâ & delicto. l. aliud est fraus ff. de verb. signif. Fraudare, pro privare. l. 2. ff. De his qua intest. delent.* But here, *Fraud* signifies the prejudice arising to the Creditors by unlawful Alienations, and even in the Civil Law it was taken *pro damno pecuniario. l. 18. §. 1. in fin. ff. de judi. l. 33. §. 2. ff. ex quib. caus. maj.* And he is said to defraud his Creditor, who prejudices him by that Alienation, without necessity of proving any previous design of Cheating; for that design being a Secret and latent Act of the Mind, the Law which designed mainly the Indemnity of the Creditor, would not burden him with so narrow, and difficult a Probation. But *presumptione juris, & de jure*, concluded, that Alienation to be made in defraud of Creditors, which wanted an onerous Cause: and this is *fraus in re*, though not *in consilio*. And Lawyers have well distinguished, *fraudem in re, à fraude in consilio, Accurs. ad §. in fraud. just. quib. ex caus. manum.* which is suitable to the Distinction used by the Law it self, in the Title, *de dolo. Inter dolum ex propositio, & dolum ex re ipsa*: for *fraus, & dolus*, differ only, as *Genus, & Species*. *Fraus* being more general than *dolus*, as is fully proved by *Bargalius, de dolo lib. 5. c. 4.* But albeit the Civil Law makes Alienations *in conjunctam personam*, to be only sufficient Probation, *si alia presumptiones concurrant, l. si quis C. de bon. damnat. Burgal. de dol. c. 8. l. 5. num. 43.* Yet our Law makes the want of an onerous Cause, *per se*, though nothing concur, to be a sufficient Probation of the Fraud, against a conjunct, or confident Person. And albeit by the Civil Law, *fraus, & eventum & consilium desiderat. в отъѣтъ нахъ а вѣдомѣна, нахъ елика вѣдѣти. l. 79. Basil. de reg. juris. & l. 15. Basil. l. 1.* Yet our Law requires only *fraudem ex eventu*, without considering whether there was *fraus in consilio*; for albeit he who received the Disposition, knew not that the Disposer had Debt, or Creditors: Yet if the Estate of the Disposer was not able to pay his Debt, our Law will reduce that Disposition, if made without an onerous Cause; which is also expressly contrair to *l. 6. §. 4. Basil. h. tit.*



*qua in fraud. cred.* ο εν ειδησει τε απατασθαι τις δαυς, ας ωσαν τε προς βλαβην υνωμιωται ουχλ ο αγνωω. What Probation shall be sufficient in Reductions, upon this Statute, is determined by this Paragraph; and though the Statute appoint the Probation to be by the Oath of the Party Receiver, or by Writ, bearing no onerous Cause, or bearing to be for Love and favour; yet the Practice has in this point so varied, that it will be fit to reduce our present Decisions into these Conclusions. 1. Narratives, bearing the Disposition to be for true and onerous Causes, being but the Assertion of the Party Granter, does not prove the Cause to be onerous; else it would be very easie to elude the Act.

2. Though the Narrative does not prove for the Granter, yet it proves against him, *nam verba narrativa*, as Craig observes, *pag. 145. licet saepe falsissima, probant tamen contra proferentem*. And therefore, if the Disposition quarrelled, be made to a conjunct Person, and bear to be made for Love and Favour, it will be reduced, though the person to whom it is granted, should offer to prove the onerous Cause, as was found in the case *Stuart contra Graham*, nothing can prove better the Design of the Partys, than a Writ under their own hands, for as this cannot fail, so if the receiver should be allowed to lead a subsequent Probation, for proving the onerous Cause, contrair to the Writ produced, it is very probable, that he might use indirect means for proving the said onerous Cause, and this might both disappoint the Creditors, and open a door to Perjury; & *sibi imputet*, the pursuer who accepted of a Writ, bearing such an Narrative. And yet there being a Reduction raised, of an additional joyniture made by Sir John Falconer to his Lady, upon this Act of Parliament; The Lords allowed her to prove the onerous Cause, before answer albeit the Contract bore; to be for Love and Favour, for she being a Woman might easily lapse in taking a Right with a wrong Narrative, but she having only instructed this onerous Cause by producing Bonds to which her Mother or Sister had Right, and which were found lying among Sir John's Papers; the Lords would not sustain the same because there was no Right produced by them thereof to Sir John, prior to the additional Joyniture; but they would not sustain the Mothers offering now to make a Right, because the Buyer of the Land seing the Right null, as made for Love and Favour only could not be prejudged by making up a Title posterior to his Right. And thus it seems, that *verba narrativa* ( which is the Reason here pressed ) *probant only presumptivè etiam contra proferentem*, and so the Presumption may be taken off, and elided by a contrary clear Probation; especially where the Writ is granted to Women, ignorant Men, or Souldiers, or even to such as are judicious; if they were absent. This Decision was betwixt *Glenfarquhar* and Sir John Falconers Lady, January 1688. 3. A Right made by very conjunct Persons, such as Father and Son, or made to Persons against whom there lies a presumption of Fraud, either because of the Relation, or because the receiver had no visible Estate, wherewith to acquire *ex titulo oneroso*, in that case, though the Right bear an onerous Cause; Yet the receiver must prove the onerous Cause, otherwise than by the Narrative. 4. If the Disposition bear, that the same was made for satisfying of Debts, owing by the Disposer, or for satisfying a Debt owing to the Receiver: he must prove the onerous Cause as was found 23. March 1624. *Duff contra Kellie*, though the Disposition there, was made only to a Brother in Law, and the reason of this seems to be, because if there was any antecedent Debt, that Debt may be easily proven; and the Lords have proceeded, so far according to the presumptions of Fraud, which have appeared, that where Bonds have been produced, proving the Disposer to be Debitor, prior to the Disposition; they have yet ordained the onerous Causes of these Bonds to be proven. Because if confident persons design to cheat their Creditors, they may as easily grant Bonds bearing borrowed Money: and then Dispositions for payment of these Bonds; as they

they may simply grant Dispositions bearing onerous Causes. And as a Minors Disposition would not be found proven to be for an onerous Cause, tho' granted for payment of a preceeding Bond, so neither should a Disposition granted by a Bankrupt; for a Bankrupt is as prone to cheat, as a Minor is to be cheated. And therefore, if the presumptions of fraud be very strong, they will ordain the party receiver to instruct the onerous Cause, even of the preceeding Bond, by the parties who received, and the Witnesses who were present; or else will ordain the cancelled Bonds to be produced, or at least the party receiver to depone thereupon, as was found, *December 1671. Duff contra Col-lodin*, and *December 1673. Campbell against Campbell*. In which last case, a woman being Creditrix by her Contract of Marriage, as being provided to the half of the Moveables which should pertain to her Husband, the time of his Death, and to 200. Merks out of the other half, pursued Reduction of a Disposition made to her Husbands Brother of his Moveables, vvho defending himself by a Disposition, made for an onerous Cause *viz.* A Bond granted by his Brother to him, it was urged, that the Brother to whom the Disposition was made, should prove the onerous Causes, of that Bond, for tho' the Bond bare onerous Causes, yet it is easie by such Bonds to cheat Creditors. And it was presumeable in this case, that the Bond was not granted for an onerous Cause, since payment of Annualrent and Execution was deferred till the granters death. Notwithstanding of which presumption, the Lords allowed the receiver to give his Oath upon the onerous Cause: especially seeing it was ordinar for Brothers to spare their Brothers, both as to Annualrent and as to Execution: And much more when the Brother who granted the Bond was sick, and would die shortly in all humane probability. Nor did they think fit to burden the receiver with other Probation of the onerous Cause, since the Disposition bare to be for onerous Causes, and the Bond was produced, bearing to be for onerous Causes also. So that to require a higher Probation backward, was *dare progressum in infinitum*. And it was well known that Brothers have such private Transactions, Trusts and Lendings, that they pay and receive Money, to, and from one another, without Witnesses. 5. When Bonds are granted to Trafficqueing Merchants, who are Brothers in Law, or such Relations as are known to be men of integrity; it is hard to put them to prove the onerous Cause, otherwise than by their Oath, for Merchants and others use not to adhibite Witnesses to all their Bargains, and in many cases they cannot have Witnesses to their Bargaining, being made abroad, and in remote Countries; and to tye them not to make Bargains with their near Relations (with whom ordinarily they enter into Societies) were to ruine all Commerce. And though Moveables use to be transmitted without Writ, nor does the Law require any Writ, to their transmission; yet in the former case of *Anderson*, the Lords forced him to prove the onerous Cause of his Disposition to *Howats* Moveables, though he alledged that he could net be in a worse condition by his having a Disposition, than he would have been without it: but to it is, that his Right to Moveables would have been sufficient without Writ; but here there was a Disposition, but where there is no Disposition, it were hard to reduce a Right made to Moveables, because I could not prove the onerous Cause. As for instance, If I bought a Horse, and payed the Money, no Creditor of the Sellers could force me to prove the price to be payed. 6. Sometimes the Lords use to suffer the receiver, to instruct the onerousness of the Causes, by one or moe Witnesses, and to give their Oaths in Supplement, and according as the Relation is remote, or the presumption of the receivers honesty strong, they lessen the necessity of the strong adminicles. And thus the 5. *July 1673.* In the case of *Margaret Home contra Smith*, they sustained one Witnesses, deponing that he was Witness to such a Bond, & that

he heard the granter of the Bond acknowledge that he was Debitor, to be sufficient adminicles, being joyned to the Defenders Oath of Supplement. And in the case above cited, 18. November 1669. *Andersons* Disposition being quarrel'd, as being *omnium bonorum*, and for a false cause, a great part of the sum for which it was granted, being payed before the Disposition; yet the Lords sustained the Disposition in swa far, as it was granted for Sums owing before the Disposition, to be proven by the oath of *Anderson* himself, and of the persons to whom the money was pay'd, & for what sums were pay'd before Diligence at the Persuers Instance, tho' after the Disposition, to be also proven by the oath of the common Debtors, and of these to whom the Debts were payed: And yet where the Disposition did bear, to be not in general for payment of the Granters Debts, but particularly for payment of the Debts after specified, and some of the debts being fill'd up with new and different Ink, the Lords would not allow these Debts, except the Defender would offer to prove, that these Debts were fill'd up before the persuer did Diligence as a Creditor, after which time there being *jus quassum* to him by his diligence, as no Disposition could have been made to his prejudice, so neither could he be 'prejudged by filling up other Creditors names, than these contained in the first Disposition; for else it were easie to cheat all Creditors by such Blanks. And yet here it was offered to be proven, that it was communed expressly, at the time of the granting of the Disposition, that these Debts should be payed which was alledged to be sufficient, being proponed in fortification of the Disposition, which was prior to the Creditors diligence, 15. January, 1670. *Lady Lucie Hamilton*, against the Laird of *Dunlop*, and others.

These Remarks may reconcile the contrair Decisions that are to be found upon this Head, such as the 22 January, 1630. *Pringle* contra Mr. *Mark Ker*. Wherein, the Lords found that the Pursuer ought to prove, that the Bond was made without any just or necessary Cause, either by Write, or by the Oath of the Party Receiver of the Bond, & found no necessity to burden the Receiver of the Bond, to prove an onerous Cause thereof, any other way, than by the Bond it self, because as is there observed, when Parties borrow Money or contract mutually, there is no other way to prove the borrowing or contracting, but by the Writ then made; and found expressly, that this was not a Negative which proves it self. And yet upon the 12. February, 1622. It was found that this part of the Act of Parliament was a Negative, and proved it self,

It seems likewise, that if the Party who made the Right, was not able to pay the Debt otherwise, that then the Probation should be so much the stricter: And though the Oath of the Receiver should not be taken as a full Probation; yet if the Receiver of the Disposition have in any former pursuit, been forced to depone upon the onerousness of the Cause, that Oath ought to purge any presumption of Fraud; for though that pursuit should not bind any other than the persons who were Pursuer or Defender there, as what was *inter alios acta, quæ aliis non nocet*, yet the Receiver having been put to swear, ought to have this advantage also, as he had that trouble. And that Oath being upon the same subject-matter, it ought to be still much respected; especially since this Oath is only required to clear the Judge, as to the truth of the Debt, and as to the onerousness of the Cause.

Whether a Disposition procured by a Tutor to his Pupil may be quarrelled, as granted in defraud of lawful Creditors, and how the Fraud may be proved, in that case it may be doubted, for it may seem, that no mans Right can be taken away, without some Act of his own, and the Tutors Oath cannot prejudice his Pupil, for a Tutor may make his Pupils condition better, but cannot make it worse. And yet there may be two distinct cases considered



red here, one is, if the Disposition be granted without an onerous Cause; and there is no doubt but such Dispositions may be quarrelled, for if the Minor cannot instruct an onerous Cause, his Disposition is null; and there should be no difference as to this, betwixt Majors and Minors: And in this sense is to be understood, l. 6. §. 10. h. t. *Si quid cum pupillo gestum est, in fraudem creditorum, Labeo ait, omnino revocandum esse, quia pupilli ignorantia non debet esse capiosa creditoribus, & ipsi lucrosa*, which agrees with l. 6. §. 6. Basil. h. t. though it be the more general *οτι οτι ανθρωποι οραχθητι ομι επιψηρατο παυατραςται*. The second case is, when the Tutor payed a price in the Pupils name, but knew it was granted to defraud the Disposers Creditors, it seems that though a Tutor cannot depone upon Rights not acquired by the Tutor himself, yet in Rights acquired by himself, he may depone, and his Oath acknowledging the fraud should annul the Pupils Right acquired by his Tutor, for *quem sequitur commodum, eum sequi debet incommodum*: and that there is no reason the poor Creditors should be prejudged by inserting the Pupils name, but he ought to pursue his Tutor. But yet I incline rather to think, that if any Tutor knowing that such a Debitor was to defraud his Creditors, did lend out my Money to buy Land in my name; that though his being partaker of the fraud might have annulled this Right, if it remained in his own person, yet his fraud being meerly personal, cannot prejudice me who was innocent, no more, than if my Factor should collude with such a Debitor, would his collusion prejudice me. And so neither of their Oathes can prove against me, for their fraud is not relevant against me, except in so far as I have received advantage by the fraud of my Tutor, or Factor: in which case, deeds either done by the Minors self, or by his Tutor, are reduceable at the instance of lawful Creditors l. 10. §. 3. Basil. h. t. *αν ανδρας ος εδωκεσ αγρεσθαι τι παρ αυτου ερωτ ζωντος ος οσιν εχουσιν τοις λοιποις τοις χλαπτοις*. But if Minors sell any Lands in fraud of their Creditors, then if they sell without the consent of their Tutors or Curators, the Alienation will be *ipso jure* null, and so needs not be reduced: But if the Disposition was made with the consent of Tutors and Curators, though it be reduceable upon minority and *Lesion*, yet the Minors Creditors cannot raise a Reduction *ex hoc capite*, for that reason is personal, *nec egreditur personam minoris*; but the Creditor in this case must comprise the Right or Action competent to the Minor, & as having Right to the Action in manner foresaid he may reduce the deeds done by the Minor.

Whether a Defender in these Reductions *ex capite fraudis*, may be forced to depone whether he was *particeps fraudis*; may be doubted, and it appears that he cannot, for the being partaker of the fraud, by this Statute diffames all such as are guilty of it. And by our Law, no man is obliged *jurare, in suam turpitudinem*. But yet I find that the Lords have *ex nobili officio*, obliged parties to be examined upon their accession to such contrivances. 7. Febr. 1673. Dame Elisabeth Burnet contra Sir Alexander Fraser. And even in Improbations, they examine, *ex officio*, the parties who are alledged to be Authors; though the hazard be greater there, than in these Reductions. And being reasons of circumvention are referred to Oath, why may not the being partaker of the Fraud, be referred to Oath? If the Lords, and His Majesties Advocat, declare, that the Deponers Oath shall not infer, *infamiam juris*, against him, which is a criminal punishment; without which be secured to him, I conceive he is not obliged to depone.

It may seem, that the Action of Reduction, founded upon this Act, against such as are partakers of the Fraud, should not prescribe, because this is a cheat which the Law ought not to maintain, nor assist, and this should no more prescribe, than *actio falsi* doth; whereof this cheat seems but a branch, or which at least, it doth much resemble. And by the Canon Law

( which as *Craig* observes, we prefer to the Civil Law in *Scotland*, where matters of Conscience are considered ) he who is in *mala fide*, cannot prescribe *c. Fin. de prescript.* And to allow the partaker of the Fraud a security of prescription, were to tempt him to cheat. Notwithstanding of all which, certainly all Actions upon this Act would prescribe: For neither our Act 28. Par. 5. 7. 3. Which appoints the prescription of moveable Rights, nor the Act 1617. Which introduced prescription in Heretable Rights, makes any exception in favours of this Action. And our Law being desirous to secure all persons in general, has drawn these Acts very comprehensively, & *sibi imputent*, such as are prejudged, who suffered so much time to elapse without diligence. Likeas the Civil Law, which considered *mala fidei possessores*, with a very unfavorable eye, does allow the benefit of even 30. years prescription, *mala fidei possessori*, for the same Reason as is clear, *C. de prescript. 30. & 40. annor.* And the same is observed in *France Guid. Pap. quest. 199.* And though we observe the Canon Law, in case of Marriage, Teinds and such like, which are somewhat Ecclesiastical by their own nature; yet in prescriptions vvhich had their original from the Civil Law, we follow the dictates of that excellent Law.

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*Or the most part of the Price thereof was converted, or to be converted, to the Bankrupts profit and use.*

ANother presumption of the fraudulent Disposition of the Bankrupts Estate, is, if the price of the Debtors Estate was converted, or to be converted to the Debtors own use, and profit. And this proceeds upon the same reason, whereby the Rebels Escheat is declared null, if he be suffered to remain in possession, Act 145. Par. 12. Ja. 6. And as by that Act, the suffering the Rebels Wife or Bairns to remain in Possession, is equivalent, as if the Rebel himself remained in Possession; so if it can be proven, that the price of the Debtors Land was applyed to the behove of his Wife, and Children; I conceive it is equivalent, as if it were converted to his own behove, though this Act do not expressly bear it.

Upon this part of this Act, arose lately the ensuing debate; *Hermistoun* being obliged to pay the Lord *Sinclair* 8000. merks as an Annuity, and for his Aliment: This obligation was assigned to *John Watt*, and was by him transferred to *George Cockburn*, who did pay several Debts for my Lord, but finding that his payment, might thereafter be challenged by my Lords Creditors, as made in prejudice of them who were prior Creditors, he did take the Gift of my Lords Escheat, and gave a backbond to the Exchequer, wherein he obliged him to compt at the sight of the Exchequer, for the superplus that exceeded the payment of the Debt truly payed, or to be payed by him, for my Lord. The Creditors having quarrelled those payments upon this Act 1621. as made to their prejudice, because though it was free to the Exchequer, to gift my Lords Escheat, and to burden it with any Backbond, yet this gift was granted truly to *George*, in contemplation of his former Right; which former Right was null, as made to defraud them, and for the use of their Debtor; and the Right made to him was null by this clause, of this Statute, by which all Rights made to any person, are presumed fraudulent

fraudulent; if the Price be converted to the behove of the Debtor: and if this were allowed, poor Creditors might soon be cheated by so easie contrivances. And though His Majesty may prefer a Donator to the true Creditor, where that is chiefly designed by His Majesty; yet where the Gift is taken only by a Person who had formerly defrauded Creditors, meerly to palliat the Fraud, in that case, the Gift *laborat eodem vitio*, being also taken for the behove of the Debtors, and so is null by the former Act 147. *Parl. 12. Ja. 6.* But this was repelled, because the Lords found, that whatever might be said against the former Right, upon this Statute, yet the Gift of Escheat did sufficiently defend him, for since any Superior might allow an A-liment to his Vassal, being Rebel, and might grant his Liferent-Escheat for that effect, why should not this Liberty be allowed to the King, 3. *December. 1674.* But if this Gift had not intervened, it seems uncontraverted, that the Obliegment to pay *Sinclars* Debts, though undertaken prior to any Action at the Creditors instance, was not sufficient to defend the Undertaker against prior Creditors, for the Right being at first quarrellable at their instance, as done in defraud of them; it being a Right made for the behove of the Debtor: it could not thereafter convalesce, by undertaking the Debtors Debts. For it was all one to pay the Money to *Sinclars* Creditors, as it would have been to have payed it to himself. And if the Money had been payed to my Lord, to the end he might have payed them, the payment might without doubt have been quarrelable. And yet a Deed once quarrelable may thereafter convalesce, if there was no Fraud in the first Contrivance, *v. g.* If an Uncle should dispoise his Estate to his Nephew, who knew not of his being insolvent, this Right might be reduced upon this Statute. And yet if thereafter, the Nephew should *bona fide* undertake the Uncles Debts, before any Diligences done by the Creditors, his Disposition would be sustained in so far as true Payment was made.

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*They making the rest forth-comming to the remanent Creditors who want their due payment.*

Since by this Act, the Disposition made by a Bankrupt to one who was Partaker of the Fraud, is reduceable; so that the Buyer will be forced to quite the Land, or thing bought fraudulently to the Bankrupts true Creditor: It may be doubted, whether the Buyer, though Partaker of the Fraud, will get Repetition of the Price truly payed by him, from the Bankrupt to whom he payed it. And it may be argued, that he would not, because first, the Law never authorizes, nor lends its Assistance, to recover what is due by fraudulent, and unworthy Obligations, for there it behoved to be the Minister of Iniquity, and to serve Vice in a mean, and sordid way, *& ubi dantis, & accipientis turpitudine versatur, cessat repetitio. l. 3. ff. de condit. ob. turp. caus.*

2. The Buyer in this case cannot complain of the Law, since he knew the hazard, and yet run upon it. 3. This were to invite men to commit Cheats; whereas to deny them Action of Repetition upon the Eviction, were a ready Mean to deter them, since the hazard would be so great. 4. This may be further clear. *l. 1 C. de preser. 30. annor. & l. hi qui C. de rescind. vend. & l.*



*fin. C. de litig. & l. si fundum sciens. C. de evict. & l. 25. Basil. de reb. auth. jud. possidend.* *ἡμεῖς ὁ ἀρχαιότερος. εἰ συλλαβῶ σοι εἰς οὗτο ὅτι περιγρηλαί θύλας τοῖς ἀδικήταις σοι, οὐκ ἔχω λατὴ τῶν περιγρηλαί σου ἀδικήται.* But yet the contrair, *viz.* That the fraudulent Buyer ought to have Repetition from the Bankrupt Seller; may be urged by these Reasons, First, Crimes and Frauds are extinguished by mutual Compensation, and therefore, since as the Buyer would have had an Action of Eviction, if no Fraud had interveened, so ought he to have the same Action where the Fraud is mutual, for there it is in the same Condition, as if it had never been; for it is extinguished, *l. viro. ff. solut. matr.* 2. If the Seller should not be obliged to restore the Price, he should gain by his own Cheat, for his Creditors would be payed, by prevailing against the Buyer, and he would retain the Price. 3. Where the Buyer and Seller are in the same Condition, his condition is most favoured by the Law, who seeks only to secure himself against loss; *in pari casu melior est conditio ejus qui certat de damno vitando, l. non debet ff. de reg. jur.* And this is also clear, *per l. 3. C. de his qui vi metusve caus.* & *l. fin. C. Commun. delegat.* I would rather perhaps incline to think, that because both have offended, therefore both should be punished; the one by being obliged to refund the Price received, and the other by not getting it, though refunded: But that he should see it confiscated by publick Authority, like the Legacies left to unworthy Persons, vvho are incapable of them; for these remain not with the Testator, nor yet go to the Legator, but *sunt caduca*, and belong to the Fisk.

It may be here doubted, if in these Reductions, the Defender who is to restore what is disposed to him, will be obliged to restore the fruits of the thing sold, and whether he will be obliged to restore them from the date of the sentence, or from the time of Litiscontestation or from the Citation. The Civil Law *l. 25. §. 4. F. h. t.* ordains not only the thing it self to be restored, but the fruits which were upon the ground at the time of the Alienation, and these which were reaped after the Action was intended, *non solum autem rem ipsam restitui oportet, verum & fructus qui alienationis tempore terra coherent, quia sunt in bonis fraudatoris. Item eos qui post judicium inchoatum recepti sunt medio autem tempore perceptos in restitutionem non venire.* But the *Basilicks* differ somewhat, for they say, *qui post litem contestatam percepti sunt.* As *Fabrot* translates them, *μετὰ προατά. ἔωλησθαι.* But these may be reconciled, because though in our Law, Litiscontestation is only made by the Decision of the points *in jure*, and the assigning a day to either party to prove, whereupon an Act is extracted: yet by the Civil Law, Litiscontestation was made as soon as the Defender denyed the thing craved, and so *judicium inchoatum* differed a little with them, from Litiscontestation.

Our Senate observe as a general rule in all Reductions, to decern fruits to be restored from the time that the Possessor knew that his Right was not valid: and therefore when it was palpably unjust, they use to decern from the date of the citation, but not from the Citation upon the first Summonds, because these are but indorsations, where copies are seldom truly given, and so the defender could not thereby be put in *mala fide*. This was so decided, *Hovison contra Gray, February 1672* And yet this seems to Authorize the belief that citations upon first Summonds may be false, whereas since the Law commands them, it ought to believe them, and so punish the Forgers, rather than discredit the form. If the nullity depend upon a debateable point. they decern from the Litiscontestation, because that nullity was not clear till then, *v. g.* if a disposition were quarrelled as made to a Brother in Law, and he alledged that the Act extends not to Brothers in Law, if the Lords found the Statute to extend to Brothers in Law, *eo casu*, if it were referred to the Defender

enders Oath ; the Lords use to decern from the Litiscontestation ; because after that, the Defender could not doubt of the Nullity of his own Right, tho' before he might have doubted. But if the nullity depend upon extrinſick probation, which the Defender could not know before ſentence : as for inſtance, if it ſhould be denied by Act of Litiscontestation, that the Debitor became, and was inſolvent ; the Defender could not be in *mala fide* till this were found proven, and ſo ought not to be lyable in *fructus*, till ſentence.

I conceive that theſe generals may be likewise particularly applyed to this Statute, by conſidering three different caſes, relative to the three different parts of this Statute.

The firſt is, that of the firſt part of the Act, by which all diſpſitions made to confident, or conjunct perſons, in defraud of lawful Creditors, without an onerous Cauſe, are ſo reduceable, that the Alienation being reduced, the fruits extant are to be reſtored from the time of the intention of the Cauſe, and not only from the time of Litiscontestation. And yet it would appear, that all the bygone profits, or fruits, ought to be reſtored ; not only from the time of the Citation, but from the date of his poſſeſſion : Becauſe, 1. By the expreſſe words of the Statute, all ſuch Alienations are declared to have been null from the beginning, and ſo are in the ſame caſe, as if they had never been made. But ſo it is, if they had never been made, the Poſſeſſor behoved to have reſtored all the fruits, whether extant, or not, and even from the time of his poſſeſſion. 2. This ſeems moſt reaſonable, for the Law having diſcharged ſuch Alienations, he who Contracts in ſpight of, or to cheat the Law, ought not to be protected by it ; and the Debitor might thus prejudice his Creditors, for it is a prejudice to them to want the fruits and profits of their Debtors Eſtate, from the Alienation, till the time of intenting an Action, which poverty, or abſence, ignorance, or latency of the deed, may keep them from intenting ; and which may be very conſiderable ; and were it not abſurd, that a gratuitous Diſpoſition of an Eſtate, of ten thouſand Merks by year, ſhould carry the receiver to five or ſix years Rent, extending to 50000. Merks, becauſe theſe Rents were intromitted with prior, to the intenting of any Action of Reduction, and yet the Eſtate ſhould not be able to pay all the Debts due to the many poor Creditors, who are Purſuers of the Reduction.

The ſecond caſe is, where the Diſpoſition was made to one who was *Particeps fraudis*, and he is to reſtore even all the profits from the date of the alienation, whether they be fruits occaſioned by his own induſtry, or brought forth by the nature of the thing poſſeſt. For he who was partaker of the Fraud, is *mala fidei* Poſſeſſor, and ſuch are ſtill decerned to reſtore all, *fructus extantes rei vindicatione* ; & *conſumptos conditione ſine cauſa*, l. 3. C. de *condict. ex leg.* nor ought he in reaſon to reap advantage by his own cheat : and as he cannot blame the Law for ſeverity to him, ſince he occaſioned his own loſſe ; ſo the Creditor might complain that ſuch as cheated the Law, and him, were enriched by his loſs. And the reaſon why *bona fidei poſſeſſor facit fructus conſumptos ſuos*, is, becauſe he not knowing but theſe profits were his own, thought he might live accordingly ; this reaſon is wanting in him who is partaker of the Fraud, for he knew that theſe profits belonged to others, and ſo ſhould not have ſpent them. And though it may be alledged, that all Diſpoſitions made to confident, or conjunct Perſons, are reduceable by this Act, as fraudulent, and therefore the receiver cannot be called *bona fidei Poſſeſſor* in no caſe, for nothing is ſo contrary to *bona fides*, as *Fraus*. It is answered, that a Diſpoſition may be made to a conjunct perſon, who knew neither that the Diſponer had Creditors, or that his Eſtate was not able to pay them, and *Fraus ex eventu*, as I obſerved formerly, is not *Mala fides*.

The third case, is of Creditors who got a Disposition from the common Debtor for payment of their Debt, but it is reduceable at the instance of other Creditors, who have done diligences ; and these, I think, should according to the rules of Justice, and Reason, be only obliged to restore the profits of the thing so disposed, from the date of the sentence : for since they are more favourable than a conjunct person, who gets a Disposition without an onerous Cause, and that he *lucratur fructus ante citationem perceptas*, they ought to have more favour. But I have not heard this debated, nor decided, and it is generally believed that they would be lyable after citation, but if he hath *dolose* received payment, and was *particeps fraudis*, even he, though a Creditor, ought to restore all the profits received by him from the time of his possession. In all which Restitutions the restorer will have detention of the necessary expences bestowed by him, whether he be *bonæ fidei*, or *malæ* Possessor *l. 5. Cod. de rei vindicat.* *ἡ δὲ ἀποδομὴ μὲν τοῖς ἐν αὐτοῖς ἀναγκαῖα δαπάνηματα* *Basil. l. 10. §. 14. h. t.* To which there is also added *ἡ δὲ κατὰ γινώσκῃ τῶν δυνάμεων γινώσκῃ* *Et si quæ aliæ ex creditorum voluntate facta sunt.*

The Civil Law ordained the fruits that were upon the ground, the time of the Disposition, to be restored, though these were consumed before citation *l. 25. §. 4. h. t.* because *fructus pendentes*, were *pars soli*, and so were to be restored : but this has not been craved with us : and since they use to be *bonæ fidei* spent, there is no reason to restore them more than other fruits. I have heard it contraverted, Whether a Person to whom a Disposition is made in defraud of Creditors, may when that Disposition is reduced, pursue by way of Action, for the expences he bestowed necessarily in repairing the Lands, or Houses disposed ; and it may seem that this being once a Debt due to him, it cannot be taken away but by a Discharge : and yet Lawyers are clear, that though such expences may be retained, or that the Defender in such Reductions may alledge that his Right cannot be reduced till all his expences be repayed. Yet if he suffer his Right to be reduced without proponing upon his expences, and meliorations, then he seems to have past from them. For the Law presumes, that if he had any thing due to him, he would have craved it before he was dispossessed : Neither is it only to a Possessor *malæ fidei* that the Law makes no Action competent *pro sumptibus in rem alienam factis*, but the same is likewise asserted *de bonæ fidei possessore. l. 47. Basilic. de rei vind.* *ὅτι καὶ πικτεῖ πρὸς τὴν ἀδικασίαν ἀγορεύει καὶ ἐν αὐτῇ, ἀλλὰ παρακατασχέσει,* which agrees with *l. sumptus ff. de rei vind.* & *l. si in area ff. de condit. indebit.* But yet it is the opinion of some eminent Lawyers with us, that even after the Right is reduced, the person to whom the Right is made, may recover payment of what he necessarily bestowed, even by way of Action : and *Molineus ad consuetud. parsiens. t. i. gloss. 5.* Is of their opinion, and asserts that the present customes of all Courts have receded as to this from the Civil Law, and yet it may seem in our Law, that this is competent and omitted, and so should rather be allowed in our Law, than in the Civil Law, especially seing this is of the nature of compensation. For when the Pursuer craves the thing disposed to be restored, with the fruits and interests : it seems to be a sufficient ground of compensation, on at least an exception *quæ sapit naturam compensationis*, that the Defender bestowed as much upon the thing craved to be reduced, as may compensate the fruits, or a part of the Stock, and by expresse Act of Parliament, compensations are not receiveable after sentence, and therefore neither should it be lawful after sentence of Reduction, wherein this allowance might have been craved ; to seek allowance by way of Action, for what was bestowed in Meliorations, or necessary expences.

And



*And if in time-coming, any of the saids Dyvours, or their interposed Partakers of their Fraud, shall make any voluntar payment, or Right to any person, in defraud of the lawful, and more timely diligence of another Creditor, having served Inhibition, or used Horning, Arrestment, Comprysing, or other lawful Means duely to affect the Dyvours Lands, or Goods, or price thereof to his behove: In that case, the said Dyvour, or interposed person shall be holden to make the same forthcoming to the Creditor having used his first lawful Diligence, who shall likewise be preferred to the Creditor, who being posterior to him in Diligence, hath obtained payment by particular favour of the Debitor, or of his interposed confident, and shall have good Action to recover from the said Creditor, that which was voluntarily payed, in defraud of the Pursuers diligence.*

**A**lbeit by the first part of the Act, all Dispositions be allowed, if made for onerous Causes, to conjunct or confident Persons, yet that only holds where Creditors have done no lawful Diligence: But where Creditors have done lawful Diligence against the Bankrupt, by Inhibition, Arrestment, Horning, Comprysing, or otherways, in that case the Bankrupt against whom the Diligence is used, cannot make any voluntar Right of his

his Estate, to prefer thereby any Creditor he pleases, to the Creditor who has used Diligence, and that though the Creditor who has got the Disposition, was likewise a lawful Creditor : But in that case the Creditor who is preferred, is declared by the Act to be lyable to make forth coming the Price of what was disposed to him.

By the Principles of Reason, he seems not to Act fraudulently, who gets payment of what is due to him. But yet by the Civil Law, *postquam Creditores à magistratu in possessionem bonorum missi erant*, their Debtors could not even pay any true Con-creditor, and so prefer one Creditor to another, suitably to which, our Law has not allowed here the preferring one Creditor to another, after diligence done by Horning, Inhibition, &c. Which Diligence we have equalled to the *missio in possessionem* by the Roman Magistrate; And in effect there can be no Diligence done in Scotland, without the Authority of the Magistrat; for no Inhibition, Horning, &c. can be raised without a Warrant from the Magistrat. And as it was reasonable that a Creditor *qui sibi vigilavit*, by getting payment, should not be prejudged; so it was as reasonable, that payment made to him in prejudice of another Creditor, *qui sibi vigilavit*, by doing Diligence should not be sustained. And thus we may reconcile this part of the Statute with l. 6. §. 6. h. r. which says that *qui suum recipit nullam videtur fraudem facere*, with which agrees. l. 6. §. 2. *Basil. h. r.* *ὁ χρεὼς λαβὼν καὶ παύρηται.*

From this part of the Act, it is first observable, that though voluntary Rights are reduceable, at the instance of prior Creditors, who have done Diligence; yet necessary Rights are not, and therefore, if the Bankrupt was obliged by a Minut to sell his Land, before he was put to the Horn, if for Implement of that Minut, he should thereafter dispose his Lands, that Disposition May seem not reduceable, at the instance of a Creditor who had used Diligence, by Horning, or otherways after the Minut, though before the Disposition; Because it may be alledged, that in this case, the Creditor cannot be said to have been voluntarily preferred by partial favour, as the Act bears. For that cannot be called voluntar, to which the Disposer might have been compelled. And in this case, as well as in Reductions, *ex capite Inhibitionis*, these Dispositions which depend upon necessary Causes, are drawn back, *ad suam causam*. But the Doubt may be greater, if the Cause upon which the Disposition depended, had no specifick Obligation in it, to grant the Deed quarrelled, but only a general Obligation, *v. g.* If *Titius* should only be obliged by a Minut to dispose Lands to *Mevius*; if *Titius* thereafter being put to the Horn, at the instance of *Sempronius*, should after he was put to the Horn dispose Lands to *Mevius*; it may be doubted whether that Disposition would be reduceable, since the Minut did not bear an expresse Obligation to dispose the specifick Lands afterwards disposed, but only to dispose Lands in general: For it may be alledged, that *quoad* these Lands, the Right was voluntar, seeing there was no specifick Obligation, *quoad* these. And if such a Disposition, as this might be sustained, all Dispositions, made for onerous Causes, might be sustained,

Notwithstanding of all which, I conceive, that by voluntar Rights and Payments in this Paragraph, are understood all such Rights and Payments, as are made without any previous Diligence, though the Debtor could have been compelled to make them; and though there be a preceeding Cause, whereupon the Debtor might have been forced, to make the saids Rights and Payments, and so are necessar, *quoad* the Debtor, if other Creditors had not been concerned; yet they are accounted voluntar, as to this Act and Statute, because the Debtor having other Creditors, who might have compelled him as much as the Creditor whom he has satisfied: Yet he voluntarily

luntarily prefers and gratifies him in prejudice of their Diligence. And even in the case here instanced, of a Minut bearing an Obligation to dispoſe Land, if the Dyvour ſhould after the diligence of other Creditors diſpoſe, that Diſpoſition would be conſtrued a voluntary Right, which the Bankrupt ought not to have granted in prejudice of his other Creditors, who had done Diligence, and who might have affected the ſame Land, if the Diſpoſition had not been made; notwithstanding of the perſonal Obligation contained in the Minut. And it cannot be denied, that there is a great difference betwixt a Debitor inhibited only, and a Debitor Bankrupt; for a Debitor who is inhibited, diſpoſing what he was bound to, by an Obligation prior to the Inhibition, does not contravene the Command of the Inhibition, which only forbids him to do any new Deed, to the Prejudice of the Inhibitor. But a Bankrupt not being able to ſatisfie all his Creditors, does contravene this Law, in gratifying one, to the prejudice of others, and to the prejudice of Diligences done by them. Eſpecially ſince he could not have been compelled in Law, to prefer the Creditor who had done no Diligence.

What diligences are ſufficient to reduce Deeds done by Bankrupts for preferring one Creditor to another contrary to this Paragraph of the Act of Parliament may be reſolved in theſe Concluſions.

1. The Reſtrating of a Bond was not ſufficient, *January 1688. Welſh contra Gallatie*, becauſe Reſtration is not a Diligence upon a Bond, but only a Deed done for preſervation of the Bond; and the Reſtration cannot prove the date in a competition for it is known that a Bond will be got Reſtrated of any date, and not of the true date of which it was given in, which is a thing very puniſhable in it ſelf, for thus it may be reſtrated and oftentimes after the Death of the Granter, tho' by his Death the Procuratie expires, which is the warrant of the Reſtration; But yet I think it may be urged, that Reſtration ſhould be a ſufficient diligence, *quoad* this effect, for elſe the Debitor from Deſpite againſt his Creditor becauſe he raiſed diligence, or to prefer his nearer Friends and confidants in prejudice of the Diligence, may make and grant Rights ſo that the Remedy appointed by this Act for preventing this by uſing Horning or ſerving Inhibition, ſhall become abſolutely ineffectual and eluſory.

2. Though this Clause bear generally, that *Diſpoſitions made in prejudice of ſuch as have done lawful diligences, by Inhibition, Horning, Arreſtment, or Comproiſing, ſhall be quarrelable*: Yet it may be juſtly doubted, whether theſe words muſt be ſo interpret, as that any of theſe Diligences ſhall be a ſufficient ground, promiſcuouſly to quarrel any Diſpoſition: So that the Law conſiders not ſo much the nature of the diligence done, as the partial favour and gratification of the Dyvour, or confident who has done no diligence, and the preferring him to one who has done diligence, though that diligence was not *per ſe* proper to affect. For if it had affected properly, there had been no neceſſity for this Act, or Statute, *v. g.* If the Creditor had inhibited, the Debitor could not have thereafter diſpoſed in prejudice of that Inhibition, but the Diſpoſition would have been reducible *ex capite Inhibitionis*. But if the Creditor not knowing that the common Debitor had Money lying by him, that could be affected with Arreſtment, did omit to Arreſt, but did inhibit, it appears, that if the Debitor ſhould, to gratifie and prefer a Creditor, who has no diligence, give him that Money, this Law and Statute intended, that the Creditor who has done diligence by Inhibition, ſhould not only have liberty to reduce all Diſpoſitions *ex capite Inhibitionis*: For that was competent before this Law, but that he ſhould have *conditionem ex hac lege*, to recover that Money; though the Inhibition be no proper way to affect it. And yet upon the other hand, it would ſeem abſurd, that the uſing of an Arreſtment



should be a sufficient ground for the Uiler to quarrel a Right made of Lands, for that were *vitiosa transitio, de genere, in genus*. But as in all general Clauses, so in this, the application must be, *singula singulis*: and therefore if after a Creditor has used any real diligence that may affect Land, such as Inhibition, or Comprising, his Bankrupt Debtor, shall to disappoint that diligence, dispose his Lands to a Con-creditor, who has done no diligence; then the Inhibiter or Appryser, may quarrel that Disposition; or if a Creditor has affected any of his Debtors summs, by Horning, or Arrestment, and if to disappoint that diligence, the Bankrupt Debtor should dispose upon his Moveables in favours of a Con-creditor, *eo casu*, that Disposition to the Moveables might be quarrelled by him who has used Horning, or Arrestment: which are diligences proper to affect Moveables in our Law. Which may be further urged by these Reasons, 1. Because Inhibitions and Comprisings are not proper diligences to affect Moveables, no more than Arrestment or Horning can affect heretage: and the Law never priviledges a diligence except where the diligence could affect. 2. The Reason why the Law priviledges such Creditors as have used these diligences, is, because the Law presumes they might have affected the Bankrupts Estate by these diligences, and because it presumes that the Debtor disposed his Estate, to disappoint that diligence. But so it is, that neither could Inhibitions affect Moveables, nor can Arrestments affect Heretage; nor were these Dispositions made to disappoint such diligences and therefore, &c. 3. When men are to buy Land, they look only the Registers for Inhibitions, or Comprisings, but they never consider whether there be any Arrestments used against the Seller.

3. Though this part of the Act be conceived in favours of Creditors, who have used Inhibition, Horning, Arrestment, Comprising, or other lawful diligence; yet this Clause must be so interpret, that the meer raising of an Inhibition or Horning is not sufficient except the Inhibition or Horning be execute, as was found Feb. 1671. in the Case betwixt *Tynet, & Grahame of Greigie*. For the Act of *Parl.* mentions serving an Inhibition and using a Horning, & not the raising of either. But yet if the Bankrupt to disappoint his true Creditors, who have raised Letters of Inhibition, Horning, or Arrestment, should collude with his other Creditors who knew the raising of these Letters, and they by express collusion, should make and receive such Dispositions, I conceive these Dispositions may be quarrelled upon this part of the Act, though the Letters were only raised; for else the Act might be absolutely disappointed, and immediatly upon the raising of the Letters, such Dispositions might be made, and the Creditor who did exact diligence, & *omne quod in se erat*, should be prejudged by fraudulent conveyances, and by the nimious diligences of his Cheating Debtor. Nor should the fraud of a Creditor, receiving such Dispositions, be of advantage to the Receiver, *nam nemo debet lucrari ex suo dolo*.

4. But it is more difficult to resolve, whether a meer Charge of Horning, without Denunciation, be a sufficient diligence to make all deeds after the charge to be quarrellable upon this Act. And it may be alledged, that to charge upon the Horning, is to use a *Horning*, which is all that this Act requires. 2. The Charge is properly the diligence, for thereby the Debtor is commanded under certification, that he will be denounced; whereas the denunciation is but the effect of the diligence: and the Debtor is denounced because he did not obey. Which Reasons incline me to believe, that the charge without denunciation, is a sufficient diligence in this case; And it was so found in the case of *Alexander Chapeland* contra the Creditors of *Baillie Drummond*, for the said *Alexander* having raised a Horning against *Provost Drummond*

mond of a Disposition made the next day after that Horning, was reduced as made in defraud of his diligence, he having denounced as soon as the days of the Charge were expired, and the same Disposition was likewise reduced at the instance of Major Bateman though he did not denounce for sixteen days after the Charge, for though it was alledged that *non fecit omne quod in se erat* and that that is only to be reputed to be exact diligence, yet this was repelled, because so few days were elapsed after he could have denounced, *nec de minimis curat prator*, nor did the Major himself live in *Edinburgh* whereby he could know there was such a Disposition made: but where there was long and supine Negligence for many years after the Charge was given in, not denouncing thereupon; The Lords found not the same sufficient to reduce posterior Dispositions, for that cannot be called a diligence which is not continued *habili modo & intra tempus habile*, and this would put all Creditors to an unjust stop, for the doer of the diligence would neither pay himself, nor suffer others to be payed, and this was found *July 1687. Home and Lyle against Dalrymple*, and it holds not only in Horning, but in all other diligences as *Comprysings, &c. 8. Febr. 1681. Wilson contra Kofs*; and for the same reason, I believe that a personal Charge upon an Inhibition, would operate the same effect, though the execution were not used at the Mercat Cross; because that is only necessary to put the Ledges in *mala fide*, in order to a Reduction *ex capite inhibitionis*.

And I conceive likewise, that the Inhibition being lawfully served, though not registrated, would be sufficient *quoad* the effect designed by this part of the Act, for the Registrating an Inhibition is different from the serving of it; and the serving of the inhibition in all that this Act requires: And if the Creditor may reduce *ex capite inhibitionis*, before it be Registrat, if it be once served, that is to say, lawfully execute, much more should the execution of it, without Registration, be sufficient as to this Act. But it has been found that an Inhibition served at the Mercat Cross of the Shire within which the Lands did not ly, was not a sufficient Diligence upon which a Reduction might be raised as to Lands in other Shires by vertue of this Clause, for *quod nullum est pro infecto habetur; & quod contra Regulas juris sit, effectum juris non parit 1686. Nicolson contra Currie*.

It may be likewise observed, that though this part of the Act, must be so interpreted, as that proper and peculiar diligences may only affect; that is to say, Arrestment, Moveables, and Comprysing Heritage: yet even in that case Horning may be accounted a sufficient Diligence, after the using whereof, the Debtor being a Dvour, can neither Dispose Heritage, nor Moveables, to the prejudice of the Creditor, who used the Horning; is not only a diligence that may affect Moveables, but it is likewise a step in diligence, necessary for a Horning, previous in many cases to Comprysings, which are real diligences.

By these words *any other mean* is to be understood other Lawful diligences, beside Inhibitions, Hornings, Arrestments, Comprysings, here exprest. As for instance, if a Creditor should raise a Precept of Poynding, and should charge his Debtor thereupon, to disappoint which, the Debtor should dispose his Moveables to another Creditor, the raiser of the Precept might quarrel that Disposition upon this Clause of the Act.

It is observable, that though in the first part of the Act, after the Law has declared all deeds done by Bankrupts, in prejudice of their Creditors, without an onerous Cause, to be null; yet it subjoyns immediatly in another Clause, that if a third party shall *bona fide* acquire a Right to these fraudulent Rights, these Rights shall not be quarrellable in their person, except they were likewise partakers of the fraud. But here where the Law, in this Clause, declares, that where diligence is done by a Creditor, the Debtor cannot thereafter

in his prejudice, prefer another who is a Con-creditor, and dispoſe the Land to him, though even for an onerous Cauſe. Yet the Law has not determined, whether this Diſpoſition made to a Con-creditor, ſhall be quarrelleable in the Perſon of one, who *bona fide* has acquired that Diſpoſition from the Con-creditor, in the ſame manner as it would have been quarrellable in the Perſon of the Con-creditor himſelf. And though it may be alledged, that the Clause ſubjoyned to the firſt part of the Act, in favours of third parties, ought to be repeated here, for ſingular Succeſſors in this caſe, not being partakers of the Fraud, ought not to be prejudged: Yet if we conſider the caſe ſomewhat inwardly, we will find that a Diſpoſition made by the Bankrupt to a Con-creditor, and by the Concreditor to a third paſty, is quarrellable in the third Parties Perſon. For the Con-creditor could make no better Right than he had himſelf; and there being *jus queſitum* to the Creditor by the diligence, ſo that he might have quarrelled the Right made to one of the Con-creditors, by the common Debitor. This Right could not be evacuated by any Diſpoſition, that the Con-creditor could make, and if it were otherwiſe, the Creditors diligence might be eaſily eluded, and diſappointed: for the Con-creditor finding that the Right made to him was quarrelleable, he might ſtill transfer his Right to a third party, and there was great Reaſon why the Clause was conceived in favours of third parties in the firſt part of the Act which annuls only Deeds, becauſe made fraudulently; and therefore this Nullity ought not to have been extended againſt third Parties, who were not *participes fraudis*, for there *deſiciebat ratio legis*: But this Clause of the Act annuls not theſe Deeds upon any perſonal Account, but becauſe theſe Deeds are contrary to Diligences done by a lawful Creditor. And therefore the Nullity here ought to be extended *quoad* all, becauſe to whom ſoever ſuch Diſpoſitions were transferred, they remain ſtill to be Deeds done in prejudice of Diligences done by a lawful Creditor. And ſo the ground of the Nullity here being real, it ought to be extended to all. But if after the Right is ſetled in the Perſon of the Confident, Diligence be done againſt the Dyvour, which the Purchaſer from the Confident, neither doth, nor is obliged to know: he is in *bona fide* to acquire, and his Right cannot be queſtioned upon pretence of Diligences, as being real, & *qua efficiunt fundum*, in reſpect the Diligence is not againſt the Perſon, who ſtands in the Right, but againſt the Author who was denuded.

Though the former Concluſion holds in Diſpoſitions of Lands, yet it may be doubted, whether it ſhould likewiſe hold in Moveables, and it ſeems very prejudicial to, and deſtructive of all Commerce, that a third Party buying *bona fide* Moveables, ſhould be quarrelled for them: becauſe though they paſt through many Hands, and were bought (it may be) in a publick Mercat; yet they were originally diſpoſed by a Bankrupt, to a Con-creditor, in prejudice of another Creditors lawful Diligence; and if this were allowed, no Perſon could be in *bona fide*, or in *tuto*, to Buy or to Trade.

Upon this part of the Statute, may be raiſed this other Doubt, *viz.* a Creditor comprifes, and thereafter another Creditor gets a Diſpoſition for payment of his Debt, and is infeſt. And laſt of all a Third Creditor comprifes and is infeſt. The firſt Creditor who had comprysed, intends Reduction of the Diſpoſition made to the ſecond Creditor, as made after he had done diligence: In which Reduction the ſecond Comprysed appears, and deſires to be preferred, becauſe he is infeſt before the Purſuer, though the firſt Comprysed: and ſo would be preferred to him. And ſince *qui vincit vincenſem me, vincit & me*; it follows clearly, that ſince the ſecond Comprysed would be preferred to the firſt, that therefore he ought alſo to be preferred to the Creditor, who had got the Diſpoſition, becauſe the firſt Comprysed would be preferred



ferred to him who had got that Disposition. It is answered, for the Pursuer who is the first Compyser, that he must be preferred, and the Disposition made to the second Creditor must accrete to him, because he had done diligence before his Disposition; and by this Statute, a Creditor to whom a Disposition is made in defraud of a true Creditors diligence, is obliged to make his Right forthcoming to the Creditor who has done Diligence; whereas that Disposition would be preferred to the second Compyring, though Infeftment had followed upon that Compyring; because no diligence was done by that Compyser, when the Disposition was made, nor could the second Compyser be preferred; because he Comprised only all Right that was in the Person of the Debitor: But so it is, that the Debitor was denuded, by the Disposition made to the Creditor or Trustee. And I think the first Compyser would be preferred; for this part of the Statute, ordains not the Disposition to be null, and not to prejudice the Creditors doing Diligence, which if it had only done, the second Compyser would have been preferred; but it Ordains the Right made to the other Creditor, in prejudice of the diligence, to be forthcoming to them who did Diligence, as said is. It is here also observable, that if the Creditor who got the Disposition, had not been infeft, the second Compyser had certainly been preferred, for he had the first Real Right: Nor had the Debitor been denuded by the Disposition.

As to the Argument, *qui vincit vincentem me, vincit me* It may be answered, that this Brocard receives many Restrictions; amongst which one is, that if he *qui vincit me*, use a privileged way for prevailing against me, which is not competent against another, then *potest quis vincere vincentem me, & tamen non vincere me*. And in this case we know, that there is a special privilege given by this Statute, to the Creditor who does diligence: and by vertue of this privilege, the first Compyser prevails here. And this leads me to another Doubt in our Law, which is very considerable.

There are three Creditors, whereof one has raised, and served an Inhibition; The second compyres for Debts, and upon Bonds posterior to the Inhibition, and is infeft. The Third compyres also for Debts prior to the Inhibition, and is also Infeft. The Inhibiter intends a Reduction, *ex capite inhibitione*, against the first Compyser, and reduces his Right; and thereafter the Inhibiter compyres also, and being infeft, he competes for the Mails and Duties with the second Compyser, and craves to be preferred to him, because he has prevailed against the first Compyser who would have been preferred to him, he being but a second Compyser, & *qui vincit vincentem*, &c. 2. The second Compyser compyred from a Person who was denuded, in so far as the first Compyser denuded the Debitor by his compyring, whereupon Infeftment followed. But on the other hand, it may be urged for the second Compyser, that the Inhibiter prevailed only against the first Compyser by vertue of his Inhibition, which did sweep away the posterior Debts, whereupon that first Compyring was founded. But as to his Debts, whereupon he led the second Compyring, they were Debts contracted prior to the Inhibition, and so were not lyable to a Reduction *ex eo capite*. And as his Debts could not be quarrelled by this Compyser, so his real Right was also preferable to his, he having a prior Compyring, whereupon Infeftment followed.

As no Bankrupt can prejudice his Creditors, who have done diligence, by preferring one of them to another: So neither can he make a Disposition to any confident Person, with Power to him to pay the Debt due to himself in the first place, and his Creditors in the next place, two instances whereof I remember lately decided. The first was, the 8 of January 1669. the case whereof was this; The Laird of Craigmiller being Debitor to Mr. John

*Presbourn* his Brother, did dispoſe his Eſtate to him for payment of his Debts particularly therein related; with power to the ſaid Mr. *John* to pay any of the Creditors he pleaſed. And Mr. *John* being infeſt upon that Diſpoſition, there was a Competition for the Mails and Duties, betwixt Mr. *John*, and Captain *Newman*, who was one of the Creditors contained in the Diſpoſition: In which Competition, Captain *Newman* craved to be preferred, notwithstanding of that Diſpoſition granted to Mr. *John*, becauſe the Diſpoſition granted to Mr. *John*, was granted to the behove of the ſaid Captain, his Debt being one of the onerous Cauſes therein expreſt. To which Mr. *John* answered, that he had power by the ſame Diſpoſition to prefer any of the Creditors he pleaſed, and that the value of the Land was now exhausted by payment made to other Creditors: To which it was dupleſy by *Newman*, that this Diſpoſition was fraudulent, and reduceable upon the Act of Parliament 1621. for as *Craigmiller* himſelf could not prefer any to the prejudice of him who had done diligence, ſo neither could he beſtow that Faculty upon any other. To which it was answered, that *Craigmiller* might have diſpoſed his Eſtate to any perſon he pleaſed, for an onerous Cauſe, before Captain *Newman* did diligence. But ſo it is, that at the time of this Diſpoſition, *Newman* had done no diligence. 2. This Diſpoſition at leaſt ought to be ſuſtained, in ſo far as *Craigmiller* was Debitor to Mr. *John*, either for Debt due to himſelf, or for relief of Cautionry. To which Answers, it was replied, that *quoad* the firſt, it was not relevant, becauſe though the Diſpoſition was prior to the diligence done by *Newman*: Yet the ſaid *Newman* had done Diligence, before payment made to any others of the Creditors; and conſequently before the preference. Whereas by the foreſaid Act, no Creditor could be preferred after diligence. And to the ſecond Branch of the Answer, it was Replied, that though *Craigmiller* could have diſpoſed his Eſtate to Mr. *John*, for his payment, or Relief, expreſly before *Newmans* diligence; yet that was not done in this caſe: For this Diſpoſition was only made in general terms, for payment of *Craigmillers* Debts generally, and Mr. *John* had no advantage over others thereby, but in ſwa far as he had by preferring himſelf by virtue of the foreſaid Claufe, which was unwarrantable. And ſo the Diſponers Deed *quoad* him, was null; Becauſe *quod facere potuit non fecit, & quod fecit, facere non potuit*. Upon which debate the Lords preferred Mr. *John* only in ſo far as concerned his own Debt, or Cautionry: but ſuſtained not the preference, in ſo far as concerned other Creditors.

The other Deciſion was the 24. July. 1669. in which *Young* craved a Diſpoſition made to *Anderson*, by *Fleming*, to be reduced, as done in his prejudice, he being a Creditor who had inhibit, and compriſed. It was answered by *Anderson*, that he had granted a Back-bond, declaring that the Diſpoſition was in Truſt, for payment of the debt due to *Anderson* himſelf. And in the next place, for payment of *Flemings* Creditors: and ſubſumed, that he had payed as many Creditors as would exhaust the Price, which he was in *bona fide* to do, there being no diligence againſt him; nor could he be prejudged by any diligence againſt *Fleming*, *Fleming* being denuded as ſaid is.

To which answer it was replied, that *Anderson* being but a Truſtee, was *ſitione juris*, in the ſame condition with *Fleming*; And as *Fleming* could not diſappoint him, as a lawful Creditor; for neither could *Anderson* his Truſtee: And if it were otherwiſe, the diligences of lawful Creditors might be rendered eluſory, for the Debitor who reſolved to diſappoint the diligences of his Creditors, might ſtill diſpoſe his Eſtate to a Truſtee: which Truſtee, and Truſt, the Debtors not knowing, they could not know againſt whom Diligence was to be done. Likeas, in Law, this power to prefer Creditors, behoved to be interpreted *legitimo modo & in terminis habilibus*:

ſo

so that the Creditors could not be disappointed, but that they should be preferred according to their diligences, as they behoved to have been by the Debtor himself. In respect of which reply; the Lords preferred the Creditors; and found that voluntary payment made by the Trustee, could not pre-judge the Creditors who had done lawfull diligences. But the question here remains; whether if any of the Creditors had Arrested in *Andersons* hand, as Trustee, and had pursued an Action to make forth-coming against him: If in that case, *Anderson* was obliged to give in a qualified Oath, bearing that he was Trustee, but that there was other Creditors who had done more timeous Diligence; or if he ought to have called the Creditors, who had done more timeous diligence, as said is.

This Act is only conceived in favours of such as were Creditors, to these who granted such Dispositions, prior to the deeds contraverted. But *argumento hujus legis*, and upon the same reason of equity, the Lords constantly sustain Declarators at the instance of Creditors of the Father concluding any Right, made even by strangers, to Children *in familia*, to be null, as being granted to their prejudice, without an onerous Cause, or as being acquired by the Parents means. Which presumptions are never otherwise elyded than by alledging, that the procurer had an Estate *aliunde*, whereby he might have procured the Right contraverted. As for instance, *Sempronius* being Debtor to *Mevius*, disposes not his Estate to his Son, but acquires an Estate in his Sons name from a stranger, this Disposition so acquired, can never be quarrelled by *Mevius*, the Fathers Creditor, by way of Reduction. For the effect of a Reduction is nothing else but the annulling of the deed, and the taking it out of the way, or the bringing back of the Estate disposed, to the same condition it was in before; which would not be sufficient in this case because the Estate which the Creditor desires to affect, was never in the Debtors person. And therefore it is necessary for the Creditor to raise a Declarator, wherein he must narrate, that *Sempronius* being Debtor to him, did fraudulently acquire the Right of such and such Lands, in his Sons name; and which must be presumed to be acquired by the Fathers Estate: because they were acquired by a Son *in familia* who is presumed to have no Estate, but what he derives from his Father, or else he must Lybel, that though the Disposition be procured by a Major, who is *foris familiaris*, and Trafficking upon his own accompt, the same was truly acquired by the Debtors means, and the Disposition only acquired to be a colourable Title to disappoint his Debt. Therefore concludes, that the said Estate so bought, may be declared lyable to his Debt, in the same manner, as if the Disposition had been taken in his Debtors name.

The Common Law, and ours, does not only reprobate Dispositions, made by Debtors: *in meditatione fugæ*, but both the one, and the other of these Laws, do likewise allow the summar apprehending of Creditors, who are suspected to be Bankrupts. And by our Law, though a Man cannot be regularly Imprisoned for Debt, without Letters of Caption be formerly raised; Yet in *Masons* case, the 5. November 1667. The Lords summarly, upon a Bill, issued out a warrant to apprehend him, *tanquam debitorem suspectum, & fugitivum*. And though at first they doubted, whether their own power could extend thus far, yet thereafter they found that it might: since even the Admiral grants such warrantes, and yet there may be some speciality *quoad* the Admiral since the nature of his Jurisdiction allowes a very summary procedure, and since this his Jurisdiction is ordinarily exercised over Persons, who have an easie way to convey themselves out of the Countrey, and are ordinarily very little fixed to one place.



But because this may open a door to great Arbitrariness, and may afford great occasion of prejudging the Leidges, since upon this pretext, Merchants may, whilst they are going about great Bargains, and others about urgent and necessary affairs, be laid up in Prison upon this accompt. It will be fit to consider, what the common Law, and Lawyers have delivered as their opinion in this Point.

Lawyers distinguish *inter fugitivum*; & *suspectum de fuga*, the one is guilty only of an Intention, but the other has actually fled. And I conceive, that *meditatio fuga*, so much considered by our Law, is a mid't betwixt those two, for he who is in *meditatione fuga* has *cum suspecta* designed a flight, and has *cum fugitivo*, done some extrinick deed in order to his flight.

He who is suspect, or fugitive, may be apprehended by the common Law summarily by any Judge, who can cite that person before him, *qui potest recitare, id est, personali coercionem coercere*, Debtors, they may be also apprehended by a Judge otherwise incompetent: and he that is taken by an incompetent Judge, cannot object the incompetency. For as Lawyers observe these Debtors who are Fugitive, or suspect of flying, may be apprehended by warrands, direct either by incompetent Judges, or by warrands in direct incompetent times, such as are vacand times, or holy dayes. *glos in l. ult. C. de feriis. verb. fidei jussionis*. But with us, no Inferiour, much less incompetent Judges; can give such warrands. And it has been expressly decided, that an Arrestment laid on, even upon a Bankrupts Goods, by an incompetent Judge, was not valid, 5. December 1671. where the Arrestment was laid on in *Pasley*, by vertue of a Decreet obtained before the Bailie of *Cunninghame*, and so was found null, as *extra districtum*. Albeit the Bailie of *Cunninghame*, was also Sheriff of *Renfrew*, within which Sheriffdom *Pasley* lyes. ——— Lawyers are likewise of opinion, that the Creditor may apprehend one who is Debtor, if he find him actually fleeing: for fleeing in this case, is a kind of Crime. But if the flyer be not a Debtor by express Contract, he cannot be apprehended by the Creditor without a warrand, except either a Judge cannot behad, or that he be fleeing with the Debtors Money, *Ang. in l. extat. ff. quod met. caus.*

He who craves a Warrand, to take a Debtor who is suspect, or fugitive, must lybel to the Judge, reasons why he suspects his fleeing, as that he was packing up his Goods, or was lurking, or denyed himself when his Creditors were seeking him. And though by opinion of the Doctors, none who has an immoveable, or Land Estate, can be thus proceeded against, because it is presumed, he will have so great care for his Estate, as not to leave it: and because his Land Estate is always an abiding Cautioner: yet if either the Land Estate be very small, or if it be affected with Diligences that may exhaust it. I think that in these cases, such Heretors can have no priviledge, nor are these summary Warrands ever allowed to such as become voluntary Creditors, after the Debtor was suspected; for these ought to blame themselves, who trusted a person in that condition: But it is otherwise if they became Creditors, *ex delicto vel quasi delicto*: as for instance, if after he was suspected, he Rob or Wound, or commit any Rye. For in that case he who becomes so, his Creditor may have such a Warrand for apprehending him; and these Warrands are granted, not only for pure and liquid Debts: But even for conditional Debts, and for Debts whereof the terms of payment are not yet come; and though the Debts be small, except they be very inconsiderable, *Cacia-lup. tract. de debit. susp. quest. 3.*

Finally, the Lords declares, all such Bankrupts, and Dyvours, and all interposed Persons, for covering, or executing their Frauds; and all others, who shall give Council, and wilful Assistance unto the said Bankrupts, in the devising, & practising of their saids Frauds, & godless Deceits, to the prejudice of their true Creditors, shall be reputed, and holden dishonest, false, and infamous persons, incapable of all Honours, Dignities, Benefices, and Offices; or to pass upon Inquests, or Assizes or to bear Witnes in Judgement, or out-with in any time coming.

For the better understanding of this part of the Act, concerning the punishment of Bankrupts, and of such as advise, or assist them. It is fit to observe with the *Civilians*, that Bankrupts, and Dyvours, are either such as are become *insolvendo* by their Misfortune, rather than fault. And *quoad* these, because they were guilty of no Crime, therefore no Corporal Punishment was appointed for them by the Law; *omni corporali cruciatus remoto* saith *l. fin. Cod. qui. bon. ced. poss.* Nor does Infamy follow them, *Ibid. & l. ii. Cod. ex quib. caus. infam.* And therefore this clause of the Act, cannot be interpret of such Bankrupts: and though the clause be general, without distinguishing Bankrupts: and that it might be therefore alledged, that *ubi lex non distinguit, nec nos*. Yet general Laws must receive their restrictive interpretations from the common Law. And since the design of this Act, was (as is very clear by the Narrative) to prevent, and punish Frauds and Cheats, it is just, that these general clauses should not be extended beyond the express Scope, and design of the Act.

The second kind of Bankrupts mentioned in the Law, are these; who only by their own fault become Bankrupts; *qui suo vitio fortunam conturbant*. And the Third Kind of Bankrupts, were such, as became Bankrupts, partly by their own, and partly by the fault of Fortune, And both these last kinds of Bankrupts were denied the benefit of a *cessio bonorum*, *nam hoc est miserorum subsidium, sed non praesidium doloſorum* *l. fin. h. t. & l. pen. ff. jur. Dot.* And with us, the Bankrupts of both these Classes are denied the bene-

fit of a *cessio bonorum*, except they wear the Habit : though such are spared from it ; whom Fortune without their own Fault, has thrown into the necessity of seeking that miserable Remedy. Nor does the granting of Dispositions that are reduceable upon this Act still infer Infamy, for if a man grant a Disposition, whereby one Creditor is preferred to another who has done diligence, that Disposition would be reduceable, and yet if there remained as much as might have payed all the Creditors, that Disposition could not infer Infamy. And by this Act, such only are declared infamous, as are guilty of Fraud, and Godless Devices.

Such as give Counsel are lyable to the pains of this Act, which is likewise conform to the opinion of the *Civilians. Vid. Strach. de decoct.* But they distinguish betwixt such as gave counsel, or Advice to those who were resolved before to cheat their Creditors ; and some Doctors do conclude, that such Advisers are not punishable, because the Bankrupt followed not here the Advice of another, but his own inclination. And this Opinion was first founded upon the *Gloss. inst. de oblig. quæ ex delict. §. ope.* but others do more reasonably conclude, with *Dynus ad reg. nullus de reg. jur. l. 166.* That the Advice is equally punishable, whether the Bankrupt was resolved to follow that Advice, or his own inclination : Because the Adviser did here all that in him was, to transgress the Law, others distinguish thus, either ( say they ) the principal Offender designed only to have cheated a Bankrupt, but delayed till he got Advice, and then the Adviser is equally punishable with the Principal, because there, the Transgression was imputable chiefly to the Adviser : Or else the principal Adviser had begun to defraud and cheat his Creditors ; and the Advice did but intervene, and was but supervenient : And then the Adviser is not equally punishable, especially where the Contrivance is not otherwise probable, than by meer presumptions.

Wilful assistance also in devising or practising these Frauds, is also punishable by this Act, under which Lawyers comprehend such as transact betwixt the Bankrupts and interposed Persons, such as lend him Horses to flee, if they knew his design, and such as carry the Goods of the Bankrupt, or such as rescue him when he is apprehended, or stop his being apprehended, *Strach. de decoct. part. 2.*

The punishment appointed by this Act, is, that *they shall be reputed false persons* : By which is not meant, that they shall be punished *tanquam falsarii*, but as cheats ; for cheating is a species of falsehood. And yet if a Bankrupt did call himself by the name of a Rich Merchant, thereby to get Credit : or if any treated for him under that name, I conceive they might be pursued *tanquam falsarii.* and might be punished accordingly.

They are also declared incapable of all Honours, or Dignities, and Offices, which are not distinct punishments from infamy, but are the natural consequences of it. For whosoever is declared infamous, is *eo ipso* incapable of all Honours, Dignities, and Offices.

They are also declared incapable to pass upon Inquests, or Assyses. But this was also unnecessary, for Assyses have a mixt Employment, and without being either Judges, or Witnesses, are both, and as to their capacity of Judges, they fell under the foregoing Clause, whereby all Bankrupts and their assistants are declared incapable to be Judges. And as to their capacity of being Witnesses, they fell under the subsequent Clause, whereby such are likewise debarred from being Witnesses. And I believe the reason why they were specially debarred by this Act, was because our Law looks upon Assysers, as having an employment distinct, and differing from either a Judge, or a Witness, and *medium participationis*, betwixt the two, Though *regulariter*, in our Law, whatever debarrs one from being a Witness, debarrs him likewise from



from being an Assyser. And there is no surer legal topick with us, than an Argument drawn from a Witness, to an Assyser : And yet *argumento hujus legis*, an Assyser may be concluded different from both Judge, and Witnesse, and *medium participationis*, betwixt them.

Bankrupts, and their assysers are likewise by this Act, declared incapable to be Witnesses, and the reason of this exclusion certainly is, because the Law considers such as have cheated Creditors, as persons who would be ready to cheat Judges; that such as have been dishonest in their own Affairs, will never be honest in the Affairs of other men.

And whereas this Clause, debars them from being Witnesses, *in-with or out-with Judgement*, by Witnesses out with Judgement, are meant Witnesses in Writs, as Bonds, Sealsings, &c. But yet it may be doubted, whether in Bonds or such like Writs, this can take place : For there, the Witnesses are presumed of Law to be admitted of consent, which excludes all Objections against Witnesses; and therefore a mans Servant, or Brother, cannot be received judicially as Witnesses for him; yet they may be, and are sustained as Witnesses in Bonds granted to him. Nor did I ever hear, a Bond Sealing, or any other Writ, reduced upon this head, *viz.* That it had only two Witnesses, one whereof was incapable to be a Witnesse, because he was found by the Lords Decreet to have either granted fraudulent Dispositions, or to have been in accession thereto, except he was declared expressly infamous by the Lords sentence, as *Mason* was. Though such an objection seems well founded upon this Clause of the Act.

Not only such as defraud Creditors, are declared infamous by this Act, but even in declarators founded upon the Common Law, the persons guilty will be declared infamous; as was found in *Masons* case : And though it was alledged that infamy could not be inferred without an expresse Law; yet it was found that this Act impovv'd the Lords, to decide conform to the Canon Law in like cases, & *à paritate rationis*, and he vvas thereupon declared infamous.

I have reserved to be debated in this last place, whether by vertue of the last Clause of this Act, whereby the advysers of Frauds are to be punished: An Advocat may be examined upon his having given Advice to his Client, to defraud his Creditor : And whether he may be examined against his Client, who in consulting with him, and taking his advice, has made him as his Advocat, privie to the fraud he has committed. And because these questions are of universal consequence, I am resolv'd to consider them in general termes, both with, and without relation to this Act. For if Advocats may be forced to depone against themselves, or their Clients in this point, or as to any other thing which is the subject matter of their consultations, they may be as well forced in all things; for the parity of reason, and the publick interest being the same: I see not why if the Judge may lawfully force them in the one, he may not as well oblige them in all other cases.

As to the first question, it would appear, that an Advocat cannot be obliged to depone upon any thing which may bind a guilt upon himself, or which may defame him.

As to the next question, it would appear, that it is the interest of the Commonwealth, to have the truth of all frauds and contrivances detected; and that he who conceals the truth, is as guilty as he who commits a falsehood : But such as attentively and judiciously consider, may probably find themselves inclined to the contrary opinion, by these considerations. 1. An Advocat, is by the nature of his employment tyed to the same faithfulness that any Depositor is : For his Client has deposited in his breast, his greatest secrets; and it is the interest of the Commonwealth, to have that freedom allowed, and secured, without which, men cannot mannage their Affairs, and privat bu-

finels: And who would use that freedom, if they might be insnared by it? This were to beget a diffidence betwixt such, who should of all others, have the greatest mutual confidence in one another; and this will make ignorant men so jealous of their Advocats, that they will lose their privat business, or succumb in their just defence, rather than hazard the opening of their secrets to those who can give them no advice, when the case is half conceal'd, or may be forced to discover them, when revealed. As for instance, a Client not knowing that he can be defended against a pursuit for murder, by proving it was committed in self defence, will conceal from his Advocat, that he killed at all, least his confession, and his Advocats testimony, might be made use of against him. 2. This might afford to Advocats great matter of prevarication, and might occasion much prejudice to the Clients, for an Advocat having discovered the weakness of his Clients Cause, might discover it likewise to his Adversary: and to cover his prevarication, he might suggest to his said Adversary, that he might be examined, and so impute the discovering of these secrets, to the cogency of the Law, and not to his own privat inclinations, which made *Rob. Annas* say that *si tamen deinceps, Advocatio liceat, Clientum secreta pandere, & causarum arcana fidei sua commissa, palam & publice proferre eaque parum fido pectore effutire. In foro deinceps, non aequitatis cognitio, se latrocinium exercebitur: tribunalia murices erunt, quibus litigantium simplicitatem undique circumvenire, & imputare licebit. & in judicio non templum themidis, sed spoliarium erit, si clientes tacita confessionis fide captare, & irretire permittetur.* Whereas now, if a Clients secret be discovered, he can blame no man but his own Advocats, who are by their Honour and Interest, obliged to keep up a Secret, whose discovery can be ascribed to none, but them. The design of all Probation is to convince the Judge, whereas because of the great Relation that is betwixt an Advocat, and his Client, Law and Experience cannot but presume, that hardly Truth can be discovered this way. And this way rather opens a door to lying, or gives occasion to a fallacious, and ambiguous concealing of Truth, than helps the discovery of it. Upon which account, the Law has shunned to force Men to depone against themselves, or Husbands against their Wives, or Children against their Parents in Criminal cases. And therefore *Virgil* equals those two, *pulsatusve parens, & fraus innexa clienti.* Upon which place, *Servius* observes that Clients, *quasi colentes, Patroni, quasi patres, tantundem ergo est Clientem, quantum filium fallere:* And such was the respect due to Clients, that the Law allowed less Liberty in deponing against them, than against Blood Relations: and thus *M. Cato* is brought in, by *A Gell.* saying, *adversus cognatos pro cliente testatur, testimonium adversus clientem nemo dicit.* And the Law has still been rather inclined to evite the hazard of Perjury, than to follow too far the Interest of the Common-wealth; or of privat Parties, since God Almighty suffers by the one, and men only suffer by the other. 5. The Law *L. ult. ff. de testibus*, tells us, that *Mandatis cavetur, ut praesides attendant, ne Patroni in causa cui Patrocinium praestiterunt, testimonium dicant.* And though *Bartolus*, and some others do expone this Law, so, as if a Judge were only thereby discharged to admit an Advocat to depone for his Client. This Gloss seems to be most absurd, both because the words of the Law are general, and since they extend to both cases, and that no posterior Law has restricted them, there is no reason why both should not be equally comprehended: As also, Laws are presumed to be made still against the more doubtful case; but that Advocats could have been received to depone in favours of their Client, was so clearly against the whole Analogy of Law, that there needed no special Law to have been made against that case: but there was necessity to inform Judges, whether Advocats could

could be forced to depone against their Clients : Which Gloſs is approved by the learned *Heraldus de rer. judicatur auctor lib. 2, cap. 4.* And conform thereto, the Parliament of *Paris* did find in *December 1619.* that an Advocate could not be obliged to depone against his Client, for clearing of a fraud for which his Client was purſued.

By *Justinians 90. Novel. Cap. 8.* It is appointed, that though witneſſes may be forced to depone, both in Civil, and Criminal Matters : yet thoſe who had been employed as Mediators, who are called there, *mediatores*, ſhould not be forced to depone as Witneſſes, except both parties conſent ; for which no other reaſon can be given : But becauſe the parties had entrusted their ſecrets to them. And accordingly the Senat of *Savoy*, decided the 23, *Nov. 1596.* as *Faber* obſerves, *lib. 4. tit. 15. def. 56.* and the reaſon there given is, *ſolent enim qui litigant, agere liberius cum iſtis mediatoribus, quaſi cum confefſore, & cauſa patrono.* Than which nothing can be more convincing, *I-dem etiam in proxeneta obſervavit papienſis in form. jur. teſt. num. 15.* And in this the Canon Law agrees with the Civil : for by *Can. ſtatut. Cauſ. 2. queſt. 6.* It is ordained, that no Clergy men ſhall be obliged, or can be compelled to bear Witneſs in a caſe which has been referred to him, by two Laicks. And therefore ſince that truſt is held for Sacred, that the ſecrets even revealed to Arbiters, are not to be extorted from them, much leſs ought an Advocate, to whoſe Patrocinie, his Clients flee, and from whoſe faithfulneſs they ſeek protection, to violat that truſt, & diſappoint that confidence. *ſane id à Romana vir. ute, & animi magnitudine erat plane alienum.* And how much ſecreſie they all owed to witneſſes, who had got any thing entrusted to them, is clear, *l. 1. §. 30. ff. de poſit. ſi quis tabulas teſtamenti apud ſe depoſitas, pluribus præſentibus legit, ait Labeo, depoſiti actione recte de tabulis agi poſſe, ego arbitror, & injuriarum agi poſſe, ſi hoc animo recitatum teſtamentum eſt, quibusdam præſentibus, ut judicio ſecreta ejus quiteſtatus eſt divulgarentur.* Nor can there be a ſolid reaſon given why confeſſors cannot be forced to diſcover the ſecrets revealed to them, *ſub ſigillo confeſſionis*, and yet Advocats ſhall be obliged to reveal what is conſigned to them under the ſacred aſſurance of Truſt, and Secrecy ; Eſpecially ſeing that Law which is alledged againſt them, does acknowledge them to be *juris & juſtitiæ Sacerdotes l. 1. ff. de juſt. & jur.* Since the Common wealth is more concerned in the ſecrets of Affairs, than in the ſecrets of Devotion ; and there are greater temptations to provoke the Truſtee to diſcover the one, than the other : for few can have advantage by what a Confeſſor can reveal, but many could gain by that an Advocate can diſcover.

I muſt here beg leave to repreſent. that the riſe of this great truſt betwixt Clients, and Patrons, was. that firſt when *Rome* was founded, *Romulus* finding the error the *Grecians* had committed, in tyraniſing over their Clients, ( whom the *Athenians* called *patras*, and the *Theſſalians* *patras*, he did introduce a mutual Friendſhip and tie betwixt them. And as *Aulus Gellius* obſerves *lib. 5. cap. 13. in officiis apud majores, ita obſervandum eſt, primum tutelæ, deinde hoſpiti, deinde clienti, tum cognato, poſtea affini.* And as *Dion. halic. lib. 2. Ant. Rom.* obſerves, the Patron was obliged, *clienti jura interpretari, & lites pro eo ſuſcipere.* And this was common to both, that they could never accuſe nor bear Witneſs againſt one another *καὶ οὐκ ἀλλήλους, οὐτὶς ὁσίων, οὐτὶς θύμης, οὐ κατ' ὅρον, οὐκ ἀλλήλων, οὐκ ὁσίων κατὰ μαρτυρίαν.* And one of the Laws of the twelve Tables was, *patronus ſi clienti fraudem fecerit, ſacer eſto.* So ſacrilegious a thing was it then held, to reveal the Clients ſecrets : but thereafter this mutual dependence, and friendſhip, became ſo ſuſpect to the *Roman* Emperours, that none were allowed to be Patrons, but Lawyers, whoſe power the Magiſtrats needed not ſuſpect ; and who were preſumed to be men, ſo legal, and of ſuch integrity, that they would adviſe nothing, but what was juſt. And there-



so re, betwixt these continued the Trust, and mutual assurance that was required betwixt the old Patrons, and their Clients. Though Advocats be novv known to antiquaries, for distinction, under the term of *patroni secundarii*.

Whereas it is urged, that it is the interest of the Common-Wealth, that Truth be discovered: To this it is answered, that it is indeed the interest of the Common-wealth to discover the truth, as far as that can be done, in a convenient and lawful way; for it is likewise the interest of the Common-wealth, not to unseal the Secrets of privat Persons, and thereby to render all Trust, and Commerce suspect. And notwithstanding of this Argument, the Law has exempted men from deponing against themselves, and against many others, who are enumerat. *l. 4. ff. de testibus*, and of which we have very many instances in our Law. *Rei publicæ quidem interest, crimina impunita non esse, sed rei publicæ quoque interest, pietatis & necessitudinis officia sarta tecta conservari, sine quibus nihil sanctum haberi potest, nec inviolatum.* And Cicero lib. 3. *de offic.* does elegantly affirm, *non igitur patria præstabit omnibus officiis, sed ipsi patria conducit, pios cives habere.* Advocats are persons whose Breeding obliges them to admire Justice, as Musicians do Musick, or as a man does that Countrey in which he lives; and they having given their Oath *do fideli*, at their Admission, to give their Clients Advice according to the Laws: they cannot be presumed to have advised any thing against the Law. And it is known, that they offend in this so infrequently, if at all; that it may seem fitter not to inquire into such cases, that seldom occur, than by inquiry to introduce a jealousy betwixt Parties, who need such strict Intimacy. And as no Gentleman is desired to divulge his Friends Secrets, much less should the Law require this from Advocats, since it has obliged them to imploy Advocats: and to entrust them with their Secrets. And though men may be suspect, when they debate for their own interest, and Advantage, yet what Interest can Advocats have here, save that of their Clients, for the Client and not the Advocat suffers by the discovery, and the Common-wealth being only a collective body of Clients; in effect the Common-wealth is prejudged, because Clients are prejudged. And though a Decision in the Parliament of *Paris*, be commonly alledged upon this Point, 18. June 1580, in the case of one *Barbine*, yet all that was there decided, was, *quel advocat, & conseil, pourroit estre ouy par forme de tesmoinage.* So that the Advocats have there been willing, but were not forced: And the Parties Objections were there reserved, for the Decision bears, *Sauf a la partie, ses reproches*: So that they were but examined before answer. Nor can an Advocat be thus said to conceal truth, since he is only said to conceal, who may be forced to depone. And if Clients know, that their Advocats may be forced to depone against them, they will keep their secrets, or propose their doubts under borrowed names; and thus the design of finding out truth will be disappointed. And the Argument altogether eluded, some urge, that Advocats may be forced to depone upon the having of their Clients Papers. And that by many Decisions they have been oft forced to give them up, after full debates: wherein a special privilege upon the account of their Employment has been pretended; from which they infer, that they may be also examined upon what past betwixt their Clients and them. But to this, the easie, and just answer is, that an Advocat can be no further obliged to deliver his Clients Papers, than the Client himself could have been, but neither the one, nor the other could be forced to deliver up any Papers, but such as the Pursuer is in Law allowed an Interest in, and in so far as they are the Pursuers Papers. Nor are such Papers as ought to be exhibited, to be accounted secrets, and Advocats are obliged here, not as Advocats, but as ordinary Subjects. But I will not decide this weighty Point.

ACT

## ACT XVIII.

Parl. 23. K. Ja. 6. 1621.

*A Ratification of an Act of the Lords of Council and Session, made in July 1620. against unlawful Dispositions and Alienations made by Dyvours and Bankrupts.*

**O**UR SOVERAIGN LORD, with Advice and Consent of the Estates, convened in this present Parliament, Ratifies, Approves, and for His Highness, and His Successors, perpetually confirms the Act of the Lords of Council and Session, made against Dyvours and Bankrupts, at *Edinburgh*, the 12. Day of *July*, 1620, and ordains the same to have, and take full effect, and execution, as a necessary and profitable Law, for the weal of all His Highness Subjects: Of the which Act the Tenor followeth.

**T**HE LORDS Of Counsel and Session understanding, by the grievous and just complaints of many of his Majesties good Subjects, that the Fraud, Malice, and Falshood of a number of Dyvours and Bankrupts, is become so frequent, and avowed, and hath already taken such progresse, to the overthrow of many honest-mens fortunes, and estates that it is like to dissolve trust, commerce and faithful dealing amongst Subjects: Whereupon must ensue the ruine of the whole Estate, if the godless deceits of those be not prevented, and remedied; who by their apparent Wealth in Lands and Goods, and by their show of Conscience, Credit, and Honesty; drawing into their Hands upon trust the of Money, Merchandice, and Goods, of well-meaning and credulous persons, do no ways intend to repay the same: but either to live ryotously, by wasting of other mens substance; or to enrich themselves, by that subtil stealth of true mens goods, and to withdraw themselves, and their Goods, forth of this Realme, to elude all execution of Justice: and to that effect, and in manifest defraud of their Creditors, do make simulate and fraudulent Alienations, Dispositions, and other securities, of their Lands, Reversions, Teynds, Goods, Actions, Debts, & Others belonging unto them to their Wives, Children, Kinsmen, Alleyes, and other confident and interposed persons: Without any true, lawful, or necessary Cause: And without any just or true price intervening in their said Bargaines: Whereby their just Creditors, and Cautioners, are falsly and godlessly defrauded of all payment of their just Debts; and many honest Families likely to come to utter ruine.

FOR remeid whereof, the said LORDS, according to the power given unto them by His Majestie, and His most Noble Progenitors, to set down Orders for administration of Justice: meaning to follow and practice the good and commendable Laws, Civil and Canon, made against fraudfull alienations, in prejudice of Creditors, and against the authors and partakers of such Fraud; Statutes, ordaines, and declares, That in all actions, and Causes, depending, or to be intended by any true Creditor, for recoverie of his just

Debt; or satisfaction of his lawful action and right : They will decree and decern, all Alienations, Dispositions, Assignations, and Translations whatsoever made by the Debtor, of any of his Lands, Teyndes, Reversions, Actions, Debts, or goods whatsoever, to any conjunct or confident person, without true, just, and necessary Causes, and without a just price really payed, the same being done after the contracting of lawful Debts from true Creditors : To have been from the beginning, and to be in all times coming, Null, and of none avail, force, nor effect : at the instance of the true and just Creditor, by way of Action, Exception, or Reply : without further Declarator. And in case any of His Majesties good Subjects ( no wayes partakers of the saids frauds ) have lawfully purchased any of the said Bankrupts Lands, or Goods by true Bargains, for just and competent prices, or in satisfaction of their lawful Debts, from the interposed persons, trusted by the said Dyvours. In that case, the Right lawfully acquired by him who is no ways partaker of the fraud, shal not be annulled in manner foresaid. But the Receiver of the Price of the saids Lands, Goods, and others, from the Buyer, shal be holden and obliged to make the same forth-coming to the behove of the Bankrupts true Creditors, in payment of their lawful Debts. And it shal be sufficient probation of the fraud intended against the Creditors, if they, or any of them, shal be able to verifie by Writ, or by Oath, of the Party Receiver of any Security from the Dyvour or Bankrupt, that the same was made without any true, just, and necessary cause, or without any true or competent Price : Or that the Lands and Goods of the Dyvour and Bankrupt being sold by him who bought them from the said Dyvour, the whole, or the most part of the Price thereof was converted, or to be converted to the Bankrupts profit and use. Providing always that so much of the said Lands and Goods, or Prices thereof so trusted by Bankrupts to interposed persons, as hath been really payed, or assigned by them to any of the Bankrupts lawful Creditors, shal be allowed unto them, they making the rest forth-coming to the remanent Creditors, who want their due Payments. And if in time coming any of the said Dyvours, or their interposed partakers of their fraud ; shal make any voluntary Payment, or Right to any person, in defraud of the Lawful, and more timely Diligence of another Creditor, having served Inhibition, or used Horning, Arrestment, Compyring, or other lawful mean, duely to affect the Divours Lands, or Goods, or Price thereof to his behove. In that case the said Dyvour, or interposed person, shall be holden to make the same forth-coming to the Creditor, having used his first lawful Diligence : who shall likewise be preferred to the Con-creditor, who being posterior unto him in Diligence, hath obtained payment by the partial favour of the Debtor, or of his interposed Confident : and shall have good Action to recover from the said Creditor that which was voluntarily payed in defraud of the pursuers Diligence.

*Finally,* THE LORDS declares all such Bankrupts and Dyvours. and all interposed persons, for covering or executing their Frauds, and all others, who shall give counsel, and wilful Assistance unto the saids Bankrupts, in the devising and practising of their saids Frauds, and godless Deceits, to the prejudice of their true Creditors, shall be reputed and holden Dishonest, False, and Infamous persons, incapable of all Honours, Dignities, Benefices, and Offices : Or to pass upon Inquests, or Assizes : Or to bear witness in Judgment, or out-with in any times-coming.

FINIS. 